

No. 87-1379-CFX Title: United States Department of Justice, et al.,
Status: GRANTED Petitioners
v.
Reporters Committee for Freedom of the Press, et al.
Docketed:
February 16, 1988 Court: United States Court of Appeals for
the District of Columbia Circuit
Counsel for petitioner: Solicitor General
Counsel for respondent: Baine, Kevin T.
NOTE: 1/14/88 ext. until 2/20/88 by CJ-cited

Entry	Date	Note	Proceedings and Orders
1	Jan 12 1988		Application for extension of time to file petition and order granting same until February 20, 1988 (Chief Justice, January 14, 1988).
2	Feb 16 1988	G	Petition for writ of certiorari filed.
3	Mar 17 1988		Brief of respondents Reporters Committee for Freedom of the Press, et al. in opposition filed.
4	Mar 17 1988		Brief amicus curiae of New York and California filed.
5	Mar 23 1988		DISTRIBUTED. April 15, 1988
6	Apr 6 1988	X	Reply brief of petitioners U.S. Dept. of Justice, et al. filed.
7	Apr 18 1988		Petition GRANTED. *****
9	May 17 1988		Order extending time to file brief of petitioner on the merits until June 17, 1988.
10	May 25 1988		Joint appendix filed.
11	Jun 17 1988		Brief of petitioners U.S. Dept. of Justice, et al. filed.
12	Jun 17 1988		Brief amici curiae of Search Group, Inc., et al. filed.
13	Jun 17 1988		Brief of ACLU filed.
14	Jun 17 1988		Brief amicus curiae of California filed.
16	Jul 6 1988		Order extending time to file brief of respondent on the merits until August 4, 1988.
17	Jul 20 1988	*	Record filed. Certified original record received.
18	Aug 4 1988		Brief amici curiae of Freedom of Information Clearinghouse, et al. filed.
19	Aug 4 1988		Brief of respondents Reporters Committee for Freedom of the Press, et al. filed.
20	Aug 4 1988		Brief amicus curiae of Natl. Assn. of Retired Federal Employees filed.
21	Aug 4 1988		Brief amici curiae of American Newspaper Publishers Assn., et al. filed.
22	Aug 10 1988		CIRCULATED.
23	Sep 2 1988	X	Reply brief of petitioners U.S. Dept. of Justice, et al. filed.
24	Sep 30 1988		Set for argument. Wednesday, December 7, 1988. (4th case) (1 hr.)
25	Dec 7 1988		ARGUED.

87-1879

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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103 pp

QUESTIONS PRESENTED

1. Whether, in applying the invasion-of-privacy exemptions of the Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), to a request for an individual's criminal (or other) records that are compiled by the federal government in large national data banks, a district court may conclude that the individual has a substantial privacy interest in the compiled information even though the raw data may be "matters of public record" in local government offices.
2. Whether, in applying Exemptions 6 and 7(C), a court should make an assessment of the weight of the "public interest" in the disclosure of the particular information sought, or should instead weigh in the balance only a uniform "public interest" in the disclosure of all information in the possession of the government.

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UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
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**PETITION FOR A WRIT OF CERTIORARI
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The Solicitor General, on behalf of the Department of Justice, the Federal Bureau of Investigation (FBI), the Attorney General, and the Director of the FBI, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals panel (App., *infra*, 1a-34a) is reported at 816 F.2d 730. The majority and dissenting opinions of the court of appeals panel on denial of rehearing (App., *infra*, 35a-49a) are reported at 831 F.2d 1124. The order denying rehearing en banc and the statement of four judges dissenting from that order (App., *infra*, 64a-66a) are unreported. The memorandum of the district court (App., *infra*, 52a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 60a-61a) was entered on April 10, 1987. A petition for rehearing was denied on October 23, 1987 (App., *infra*, 62a-63a). On January 14, 1988, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * * * *

(B) On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; [or]

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy
* * *.

STATEMENT

1. This case arises from two 1978 requests under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552. Respondents, CBS News correspondent Robert Schakne and The Reporters Committee for Freedom of the Press, filed requests with the Department of Justice for information on the criminal records of William, Phillip, Charles, and Samuel Medico. The requests sought "information about any prison sentences served in federal prisons, any convictions in federal courts, any indictments by federal grand juries or any arrests by federal law enforcement authorities," as well as "information known to the Department of Justice" concerning similar state and local matters (C.A. App. 14; see also *id.* at 25).

The principal source of any such information would be the identification records or "rap sheets" maintained by the Identification Division of the FBI. Rap sheets consist of data on the subject's arrests and convictions supplied by a variety of federal, state, and local law enforcement agencies. The FBI routinely collects and compiles these data,

pursuant to the statutory authority of 28 U.S.C. 534, and at present it maintains such files on more than 24 million persons. Further information on such matters may exist in other FBI and Justice Department files, apart from rap sheets, as a result of federal investigations.

The Department denied respondents' requests on two grounds: (1) that under 28 U.S.C. 534 and FOIA Exemption 3, 5 U.S.C. 552(b)(3), all rap sheet information is exempt from disclosure; and (2) that under FOIA Exemptions 6 and 7(C), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), the information sought, whether contained in rap sheets or not, was exempt from disclosure because disclosure would constitute an unwarranted (and clearly unwarranted) invasion of the subjects' privacy (C.A. App. 21-22, 30).

2. Respondents filed the present action in December 1979, at this point limiting their requests for the first time to "matters of public record" (C.A. App. 9). The scope of the controversy was further narrowed in two respects during the course of the district court proceedings. First, the Department released all responsive information regarding all of the subjects except Charles Medico because those other subjects had died, and in the judgment of the Department there was therefore no longer any substantial privacy interest to be protected (*id.* at 247-266). Second, the Department made a partial disclosure with respect to Charles Medico, on the basis of a public interest in disclosure articulated by respondents in their summary judgment papers.

In those papers, respondents indicated that their inquiry was directed at uncovering evidence of illegal dealings between the Medicos and Congressman Daniel Flood, who had reportedly been involved in arranging for federal con-

tracts for a business operated by the Medicos (C.A. App. 136-137). Respondents further suggested that the significance of the information sought would depend on the "type of criminal record involved," and they cited information regarding "a record of bribery, embezzlement, or other financial crime" as information that "would potentially be a matter of great public interest" (*id.* at 137-138). Based on this reasoning, the Department disclosed that—apart from any rap sheet information for which the Department would claim exemption from disclosure under 28 U.S.C. 534—there were no records of the sort of "financial crimes" mentioned by respondents regarding Charles Medico (C.A. App. 256). The government continued to refuse to release—or to confirm or deny the existence of—a rap sheet for Charles Medico or any other records of non-financial crimes (or alleged crimes) resulting in his arrest, indictment, conviction, acquittal, or sentence.

The district court granted summary judgment to the government in July 1985 (App., *infra*, 52a-58a). The court first ruled that 28 U.S.C. 534 qualified as a withholding statute under FOIA Exemption 3 and barred the release of rap sheet information (App., *infra*, 54a-56a). The court then held that rap sheet information, as well as any similar information that might exist in other Department files, was exempt from disclosure under FOIA Exemptions 6 and 7(C), since the release of such information would constitute an invasion of privacy that was not warranted by any public interest in disclosure (App., *infra*, 56a-58a). The court based this conclusion on its own assessment of the privacy and public interest concerns implicated in the circumstances of this case. In making that assessment, the court took into account the Department's *in camera* submission of any and all responsive information that had been withheld (*id.* at 57a-58a & n.2, 59a).

3. The court of appeals reversed. In the initial panel opinion, the court first held that 28 U.S.C. 534 did not qualify as a withholding statute under FOIA Exemption 3, and that rap sheets cannot be withheld on that basis (App., *infra*, 6a-13a).¹ The court went on to rule that the district court had erred as a matter of law in its application of Exemptions 6 and 7(C) (*id.* at 14a-26a).² The court acknowledged that these exemptions call for a balancing of the privacy interests at stake against the public interest in disclosure, but the court of appeals found reversible error in the district court's method of striking that balance.

With regard to the privacy side of the balance, the court opined that the public availability of a record at the local level—such as a conviction record in a county courthouse or an arrest record on a local police blotter—sharply attenuates any privacy interest in such information, even when it is compiled in a large, national data bank (App., *infra*, 18a-21a). The court also dismissed the government's argument that individuals have a protectible interest under FOIA in maintaining the obscurity of such records, de-

¹ We are not seeking review in this Court of the Exemption 3 holding.

² As the court of appeals noted (App., *infra*, 17a n.11), Exemptions 6 and 7(C) call for similar assessments, but the standards applied differ. Exemption 6, applicable generally, authorizes withholding if disclosure "would constitute a *clearly* unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6) (emphasis added)). Exemption 7(C), applicable only to law enforcement records, authorizes withholding if disclosure "could reasonably be expected to constitute an *unwarranted* invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C) (emphasis added)). The district court found it "clear" that the records at issue met Exemption 7(C)'s threshold criterion of having been compiled for law enforcement purposes (App., *infra*, 56a). The court of appeals assumed arguendo that Exemption 7(C) applied (*id.* at 14a-15a). See also *id.* at 28a (Starr, J., concurring) ("There can be no doubt that on its face the FOIA request here seeks 'law enforcement records or information.'").

claring the argument "attractive as a legislative policy matter" but unrelated to the statutory term "privacy" (*id.* at 18a-19a). On the public interest side, the court began by noting the "awkwardness of * * * appraising the public interest in the release of government records" (*id.* at 21a) and sought "objective indications of the public interest" (*id.* at 23a). It found such indications in the policy determinations of state and local bodies to maintain public access to the underlying records, and it held that the district court should have deferred to those determinations in assessing the "public interest" for purposes of the FOIA balancing test (*id.* at 22a & n.13). The court remanded for further proceedings under this standard.

Judge Starr concurred in the result but expressed serious reservations about the test announced by the panel majority (App., *infra*, 27a-34a). He disagreed sharply with the majority's approach to the "public interest" side of the balancing test. While sharing to a degree the majority's discomfort with the "value-laden judgment calls" required under the balancing test, Judge Starr observed that such balancing is what Congress requires under these exemptions, and he chided the majority for "go[ing] AWOL" by declining to perform that task (*id.* at 30a).

4. The government sought rehearing on the Exemption 6 and 7(C) issues. Our rehearing submission was supported by an amicus curiae submission by Search Group International, Inc., an organization of state and local law enforcement officials, as well as agencies of the States of New York and California. These amici sought, among other things, to bring to the court's attention the complexity of state and local provisions regarding the disclosure of arrest and conviction records. In particular, amici noted that most states—which often are the direct source of data provided to the FBI for inclusion in rap sheets—treat compilations of such data as confidential at the state level,

even though the underlying information remains a “public record” locally. See, e.g., N.Y. Exec. Law § 837 (McKinney 1982); Cal. Penal Code § 11077 (West 1982). Amici further noted that the panel opinion could have adverse consequences for the sharing of information by law enforcement agencies by inducing some states to decline to provide information to the FBI, in order to prevent state-compiled information from becoming widely available by means of FOIA requests.

The court of appeals denied rehearing. The panel majority, however, altered its rationale, and Judge Starr voted to grant rehearing and affirm the district court’s grant of summary judgment to the government (App., *infra*, 35a-49a). The majority analyzed anew the public interest side of the balancing test (*id.* at 36a-40a). The panel abandoned its earlier reliance on state and local policy determinations as guides for the assessment of the public interest in disclosure, but it declined to articulate any alternative means of making such assessments. On the contrary, the panel indicated its view that the judiciary “cannot” in any principled way make such assessments with respect to particular government records (*id.* at 38a). The panel therefore held that the only “public interest” to be considered in Exemption 6 and 7(C) cases is the general disclosure policy inherent in FOIA, without any distinction based on the nature of the information sought. The panel held that the court must “balance” this static public interest against cognizable privacy interests in particular instances (*id.* at 40a).

With respect to the privacy side of the balancing test, the panel majority adhered to its view that there can be little if any privacy interest in information that is a matter of “public record” at any level (App., *infra*, 40a-42a). It clarified its prior opinion, however, by stating that the

relevant inquiry is a “factual” one and not a matter of deference to state and local policy determinations (*id.* at 41a).

Judge Starr, in dissent, “confess[ed] that [he] was wrong the first time around” (App., *infra*, 48a) and now vigorously disputed the panel’s Exemption 7(C) analysis in its entirety. Judge Starr reiterated that the majority “fail[ed] to carry out its obligation” under the statute to make an evaluation of the public interest in disclosure of particular information (*id.* at 44a). In response to the majority’s suggestion that it is impossible for judges to assess the public interest in any principled way, he pointed to case law concerning defamation of public figures as one example of a source of relevant distinctions between the public interest in one kind of information and others (*id.* at 45a-46a). Judge Starr also emphasized the distinct privacy concerns presented by “computerized data banks of the sort involved here,” noting that both Congress and many states have recognized these concerns (*id.* at 44a). He stated that the panel’s ruling would “have a pernicious effect on personal privacy interests in conflict with Congress’ express will” (*id.* at 48a-49a). He further noted the potentially “crippling” administrative burdens the panel’s ruling could impose, both by requiring federal agencies to ascertain the “public record” status of information received from outside sources and by transforming the federal government “in one fell swoop into the clearinghouse for highly personal information” in a variety of cases (*id.* at 46a, 48a). Ultimately, Judge Starr concluded that “[w]e should abandon right now our unfortunate departure from traditional FOIA analysis; having repented, we should then conduct an old-fashioned Exemption 7(C) balancing” (*id.* at 49a). Conducting that balancing, Judge Starr concluded that the district court’s determination that

the privacy interest in this case outweighed the public interest in disclosure should be affirmed (*ibid.*).

Several weeks later, the court of appeals denied the government's suggestion of rehearing en banc (App., *infra*, 64a-66a). Four dissenting judges characterized the panel's decision as "profoundly wrong," stating that "[o]pening up the vast storehouse of computerized criminal histories to FOIA requests, regardless of how remote and negligible the public interest in such sensitive documents may be, is unfortunate and misconceived" (*id.* at 66a). The dissenters observed that further review was warranted in order to "restore stability and common sense to this vital area of our law" (*ibid.*).

REASONS FOR GRANTING THE PETITION

This is a relatively straightforward FOIA case, calling for a sensible balancing of the public interest in disclosure of any criminal records concerning Charles Medico against his privacy interest in maintaining the obscurity of any such records.³ There is no doubt that the invasion-of-privacy exemptions require "the balancing of private against public interests." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). Nor can there be any doubt that Congress wanted the judiciary to perform that balancing task. See 5 U.S.C. 552(a)(4)(B) (requiring de novo judicial review of withholding of records); *Department of the Air Force v. Rose*, 425 U.S. 352, 373 (1976) (footnote omitted) (quoting S. Rep. 813, 89th Cong., 1st Sess. 9 (1965)) ("Congress enunciated a single

policy, to be enforced * * * by the courts, 'that will involve a balancing' of the public and private interests"). The district court faithfully performed the balancing task that Congress has assigned to the judiciary, and it held that the privacy interest outweighed any public interest in disclosure of these records.

Rather than affirm that determination, or provide some reasoned explanation of why there is a public interest in these particular records that outweighs Charles Medico's privacy interests, the court of appeals chose to use this case as a vehicle to rewrite FOIA law. When balancing the public interest favoring disclosure against the competing privacy interest, courts now must—according to the decision below—pretend that a request for information about a person who lives in quiet anonymity involves exactly as weighty a public interest as, for example, a request for information about a presidential candidate or a judicial nominee. They must likewise pretend that the public interest in disclosure of, for example, findings of fault in an individual's divorce decree on file with the Veterans Administration is exactly the same as the public interest in disclosure of records showing misuse of public office. They must also conduct a supposedly "factual" inquiry into whether any privacy interest in nondisclosure of particular records has "faded" because the constituent information is contained in a public record "somewhere in the nation" (App., *infra*, 20a)—an inquiry that the court of appeals apparently intends to require even in those cases in which neither the requester nor the federal government knows whether the information is in fact publicly available anywhere.

These novel principles conflict with prior decisions of this Court and other courts of appeals, and they constitute

³ According to the court of appeals, which apparently examined our in camera submission to the district court, "the offenses (if any) were 'minor' and occurred over thirty years ago" (App., *infra*, 16a). We neither confirm nor deny the accuracy of that statement, but our in camera submission is, of course, available for review by this Court.

an advertent attempt to make important new law.⁴ Such a radical transformation of FOIA law, if it were justified at all, should come from this Court, not the court of appeals. Moreover, the transformation was accurately characterized by the dissenting judges as "profoundly wrong" (App., *infra*, 66a). The principles announced by the court of appeals flout the intent of Congress that courts engage in meaningful balancing in Exemption 6 and 7(C) cases.⁵ Those principles also demean legitimate privacy interests that have heretofore received legislative recognition and judicial protection—and they result in a material decrease in privacy for millions of private individuals. Review by this Court is accordingly warranted.

⁴ There are, moreover, initial indications that the opinion in this case is being noted by other courts and may indeed engender confusion in the development of the law in this area. See *United States Dep't of the Air Force v. FLRA*, No. 87-1143 (7th Cir. Jan. 27, 1988), slip op. 7 (agreeing with the court below that courts may not inquire into the public interest favoring disclosure of particular information); *United States Dep't of Agriculture v. FLRA*, No. 86-2579 (8th Cir. Jan. 15, 1988), slip op. 9 n.3 (noting but not passing on same proposition); see also *Washington Post Co. v. United States Dep't of State*, No. 84-5604 (D.C. Cir. Feb. 5, 1988), slip op. 21 (repeating assertion of decision below that there is only a "low-level privacy interest in * * * records * * * availab[le] somewhere in the nation"); notes 10 & 13, *infra*.

⁵ As noted above, the panel assumed that this case is governed by Exemption 7(C) (App., *infra*, 14a-15a). Nevertheless, it relied on Exemption 6 precedents, and its approach would appear to apply under either exemption. The applicability of the decision below to cases under Exemption 6 as well as Exemption 7(C) enhances its "pernicious effect on personal privacy interests" (*id.* at 48a-49a (Starr, J., dissenting)). At the same time, the fact that the present case should indeed be governed by Exemption 7(C) (see *id.* at 28a (Starr, J., concurring)) makes the result below all the more troubling. The distinction between the standards of the two exemptions has always been "meaningful." *FBI v. Abramson*, 456 U.S. 615, 629-630 n.13 (1982); see also *Depart-*

1. The court of appeals dismissed any privacy interest in any records covered by respondents' requests as "insignificant" (App., *infra*, 20a) in light of respondents' limitation of those requests to "matters of public record." This analysis wholly ignores the practical differences between information contained in dispersed, obscure local records and information contained in a centralized national data bank and accessible by individual names. It also fails to provide a workable standard for agency actions.

a. The court of appeals treated as "novel" the question whether there can be *any* privacy interest in information "that [is] made available by municipal, state or federal agencies to any member of the public" (App., *infra*, 16a). It went on to reject out of hand the notion that a practical assessment of the information sought—considering such factors as its age and general ignorance of its existence or possible location—has any proper place in determining the strength of any cognizable privacy interest in it (*id.* at 18a-19a). Accordingly, while stopping just short of holding that there can be *no* privacy interest in such circumstances, the court concluded that, if the underlying information is "freely available to the general public" at any local level, "any privacy interest" in such information "seems insignificant" (*id.* at 20a).

ment of the Air Force v. Rose, 425 U.S. at 378-379 n.16. It was made more so in 1986 when Congress amended Exemption 7(C) to permit withholding whenever release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Subtit. N, § 1802(a), 100 Stat. 3207-48), thus easing the burden of law enforcement agencies in justifying the withholding of such records. The added burdens imposed on law enforcement agencies by the decision below (see pp. 19-22, *infra*) are thus especially inappropriate.

Both the approach and the conclusion of the court of appeals are at odds with previous pronouncements of this Court. In *Department of the Air Force v. Rose, supra*, this Court addressed for the first time the nature of the balancing test to be applied under Exemption 6. The Court indicated that, in assessing the weight of the privacy interests at stake, a court should take into account practical considerations such as the likelihood that persons with prior access to the information may not have realized its significance or may have forgotten what they once knew (see 425 U.S. at 380-381). As the court of appeals decision affirmed in *Rose* elaborated, "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information" (*Rose v. Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974)). The mechanistic approach of the court of appeals in the present case—which treats all information contained in "public records" as equally nonprivate even if the information is not in fact generally known and is not accessible as a practical matter except through national data banks—conflicts with the Second Circuit's *Rose* decision and ignores this important element of personal privacy.

This Court has previously considered and rejected a similarly mechanistic approach to the FOIA privacy exemptions, which likewise sought to substitute a *per se* rule for the careful balancing of interests. In *United States Dep't of State v. Washington Post Co., supra*, the Court reversed the District of Columbia Circuit's ruling that the "similar files" subject to Exemption 6 are limited to files reflecting "intimate details," holding instead that the exemption applies broadly to information "the disclosure of which might harm the individual," and that it is "the balance[e] of private against public interests, not the nature of the files in which the information was contained, [that] should limit the scope of the exemption." 456 U.S. at 599

(quoting H.R. Rep. 1497, 89th Cong., 2d Sess. 11 (1966)). In the same vein, the Court observed that even data that are "not normally regarded as highly personal"—in particular, such mundane matters as "place of birth, date of birth, date of marriage, [and] employment history"—"would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy" (456 U.S. at 600). That observation is difficult if not impossible to reconcile with the view taken below that there is, of necessity, only a "low-level privacy interest" in any records that happen to be "public[ly] availab[le] somewhere in the nation" (App., *infra*, 19a-20a).

Although *Washington Post* dealt principally with the threshold issue of the definition of "similar files" under Exemption 6, the court of appeals in the present case erred in not heeding its more general teachings about the breadth of the privacy concerns to be considered under FOIA, and the importance of conducting a genuine balancing of interests instead of retreating into *per se* rules. In addition, the court misconstrued this Court's commentary in *Washington Post* on the particular matter of requests for "public records." That case involved a request for information regarding whether certain individuals held United States passports. In remanding for the court of appeals to conduct an Exemption 6 balancing, the Court stated that "the fact that citizenship is a matter of public record somewhere in the Nation *cannot be decisive*" (456 U.S. at 603 n.5 (emphasis added)).⁶ The court of appeals in the present case has gone counter to that admonition by

⁶ The Court added that "[t]he public nature of information *may* be a reason to conclude, under *all* the circumstances of a given case, that the release of such information would not constitute a 'clearly unwarranted invasion of personal privacy'" (456 U.S. at 603 n.5 (emphasis added)).

treating the public record status of criminal history data “somewhere in the Nation”—even if only in a county courthouse or police station—as the decisive element in its “deference-driven, single-factor test” (App., *infra*, 48a (Starr, J., dissenting)). In essence, the court held that any person who has ever been arrested in a village that does not treat arrests as *secret* has no significant privacy interest, ever, in the fact of his arrest.

b. In narrowly circumscribing the “privacy” interests relevant under FOIA, the court of appeals has not only acted inconsistently with this Court’s teachings but also departed from the language and history of the statute itself. The court has also ignored the well-recognized and unique privacy concerns raised by centralized compilations of criminal and other data on individuals by government agencies.

The statutory phrase that the court construed in this portion of its opinions was simply “personal privacy.” The court observed that “[w]hat is encompassed by the ‘personal privacy’ language of FOIA is, of course, a question of legislative intent, but there is no suggestion in the legislative history of Exemption 7(C) that ‘privacy’ as used in the exemption has other than its ordinary meaning” (App., *infra*, 16a-17a). Yet the court has, we submit, given that statutory term a meaning that is far more restrictive than its ordinary usage.⁷

⁷ The court of appeals faulted as overbroad our submission that, “if the release of the records causes any embarrassment or harm to a subject’s reputation, then such release necessarily results in an ‘invasion of personal privacy’” (App., *infra*, 18a). The court found our position “attractive” but unsupported by “the FOIA or its legislative history” (*id.* at 19a). The legislative history, however, squarely supports our position. “The limitation of a ‘clearly unwarranted invasion of personal privacy’ [in Exemption 6] provides a proper balance between the protection of an individual’s right of privacy and the preservation of

In common parlance, “privacy” is not limited to those matters concerning an individual that are officially confidential. The term “privacy” is defined as “the quality or state of being apart from the company or observation of others.” *Webster’s Third New International Dictionary* 1804 (1981). Thus, contrary to the “plain language” argument advanced by the court of appeals (App., *infra*, 16a-18a), neither the statute itself nor the Senate report’s reference to “private affairs” supports the notion that a local government’s failure to take steps to conceal information means that there is no privacy interest in it.

In legal terminology, “privacy” has been applied to a wide range of interests protected by tort law and the Constitution. See generally W. Prosser & R. Keeton, *The Law of Torts* 849-869 (5th ed. 1984); *Carey v. Population Services International*, 431 U.S. 678, 688-689 (1977). It has been defined as “the individual’s right to control dissemination of information about himself.” A. Breckenridge, *The Right to Privacy* 1 (1970). It is often defined more simply as “the right to be let alone.” E.g., W. Prosser & R. Keeton, *supra*, at 849 (quoting T. Cooley,

the public’s right to Government information by excluding those kinds of files *the disclosure of which might harm the individual.*” H.R. Rep. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added); see *Washington Post*, 456 U.S. at 599 (emphasizing the quoted language); *id.* at 601 (repeating the same language). We do not, of course, contend that all information whose disclosure would “harm the individual” is per se exempt from disclosure; such an argument would indeed “prove[] too much” (App., *infra*, 19a). We do, however, emphatically contend—contrary to the position of the court of appeals—that harm to the individual resulting from the federal government’s disclosure of information about him is a privacy interest that always deserves to be considered in the Exemption 6 or 7(C) balance, and that its significance turns on a realistic appraisal of the degree of harm that would be caused by disclosure, not on a reflexive insistence that all “public records” give rise to only a “low-level privacy interest.”

Torts 29 (2d ed. 1888)). There is no reason to doubt that Congress intended, in FOIA, to reach the individual's privacy interest in information about himself that is not in fact known to the world at large, even if it is theoretically lawfully available to one who knows where to look.

There has been widespread concern that privacy is, as a practical matter, threatened by the availability of compiled information in large, centralized government data banks, which offer ready access to records that may be "public" in some sense but would otherwise be widely dispersed. See generally R. Smith, *Compilation of State & Federal Privacy Laws* v (1984-1985 ed.); Lautsch, *Digest and Analysis of State Legislation Relating to Computer Technology*, 20 *Jurimetrics J.* 201, 210-211 (1980). Numerous governmental entities have recognized the need to protect the subjects of such information against inappropriate disclosure. As noted by Judge Starr in dissent, for example, a "host of state laws" protect the very sort of criminal history compilations at issue here from disclosure (App., *infra*, 44a; see also R. Smith, *supra*, at 3-4).

As Judge Starr also noted, the legislative history of the Privacy Act clearly evinces Congress's concern about the threat to privacy posed by compiled information. App., *infra*, 44a (citing H.R. Rep. 93-1416, 93d Cong., 2d Sess. 3, 6-9 (1974), reprinted in Staff of the Joint Comm. on Government Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974, Source Book on Privacy* 296, 299-302 (Joint Comm. Print 1976)). Congress has also required, in connection with federal grants to state and local agencies to support the collection of criminal history information, assurance that "the security and *privacy*" of such information is maintained, and that it "shall only be used for law enforcement and criminal

justice and other lawful purposes." 42 U.S.C. 3789g(b) (emphasis added).⁸

The court of appeals erred in equating the "privacy" interest in information with official secrecy at every level of government where the information is maintained. An individual has a practical privacy interest in arrests and other incidents that occurred in the distant past, even if they are not officially confidential. If the information becomes available to "any person" (5 U.S.C. 552(a)(3)) through a single FOIA request to the FBI and no longer requires a search of courthouses and police blotters across the nation—many not indexed by name—the individual's life will be a good deal less private.⁹

c. The court of appeals' ruling also imposes novel and unworkable requirements on federal agencies. The FBI

⁸ In the legislative history of that provision, Congress referred to "the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemination of criminal justice information." S. Conf. Rep. 93-349, 93d Cong., 1st Sess. 32 (1973).

⁹ To be sure, this Court has construed the First Amendment to preclude the imposition of tort liability for "invasion of privacy" on those who publish truthful information gleaned from public records of court proceedings. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But the apparently absolute right of the press to publish such information once in its possession is, we submit, more reason—not less—to be circumspect in making the federal government an *additional* source of information merely because it is publicly available "somewhere in the nation." The rationale of *Cox Broadcasting* is not—as the court of appeals seemed to think (App., *infra*, 20a)—that the public availability of information somewhere renders any remaining privacy interest in that information insignificant. Rather, this Court recognized that it was dealing with a "sphere of collision between claims of privacy and those of the free press," with legitimate interests to be considered on both sides (420 U.S. at 491). Congress has directed the courts also to consider the legitimate interests on both sides of the Exemption 6 or 7(C) balance.

often will not know, without further inquiry, whether a particular rap sheet entry is reflected in local "public records." Even if the state agency that submitted an arrest record considers it confidential, for example, such a record may still be "public" at its original source. And the FBI would have no way of knowing, without a specific inquiry at the time of the FOIA request, whether particular information has been removed from the public record by the state or local government. The administrative burden imposed by this aspect of the court's opinion would be "substantial (if indeed not crippling)" (App., *infra*, 46a (Starr, J., dissenting)).¹⁰

A requirement that agencies ascertain, at the time of each FOIA request, the status of particular information under local law imposes a new obligation on agencies, which is to be found nowhere in FOIA itself. See generally *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975) (condemning court-imposed requirement that agencies generate new records in order to respond to FOIA requests). But the court of appeals' analysis affords an agency no other way of protecting even the conceded privacy interest in information that is secret at all levels of government. Although the court suggested that the FBI might fulfill its obligation by referring the requester to the providing agency (App., *infra*, 26a), such a response would

¹⁰ A subsequent decision of the court of appeals confirms that its approach to privacy interests under Exemptions 6 and 7(C) will make it essential for agencies to ascertain the "public record" status of requested information. In *Ostrer v. FBI*, No. 86-5445 (Jan. 19, 1988) (unpublished), a case involving FBI rap sheets, the court remanded for further consideration in light of its decision in the present case. In so doing, the court stated: "In order to evaluate the privacy interest, we need to know whether the information in the 'rap sheets' has been placed in the public domain by any local, state, or federal agency ***." Slip op. 9 (emphasis added).

tell the requester that the subject "has an arrest record"—incomplete yet damaging information that may be all the requester cares to know.¹¹

While imposing such a dilemma on any agency is contrary to general FOIA principles and the policies of Exemption 6, doing so in the present case is particularly misguided, since it fails to take any account of Congress's special concern for law enforcement records and information, as reflected in Exemption 7(C). As noted above, Congress amended that exemption in 1986, to permit withholding when release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (new language emphasized). This change was made "with the avowed purpose of *** eas[ing] considerably a Federal law enforcement agency's burden in invoking [the exemption]."¹² See *Irons v. FBI*, 811 F.2d 681, 687 (1st Cir. 1987) (quoting 132 Cong. Rec.

¹¹ In its opinion on rehearing, the panel majority attempted to turn this argument around, characterizing our assertion that referral of requests to the original sources is "tantamount to disclosure" as an admission that the information is the same, whether it comes from FBI rap sheets or local arrest records, and therefore that the issue of compilation is "immaterial" (App., *infra*, 41a (citing *FBI v. Abramson*, 456 U.S. 615, 624 (1982))). The majority erred, however, in its supposition that the form in which information is compiled or transferred is always irrelevant to FOIA analysis. Although this Court in *Abramson* held that "law enforcement" records do not lose their status as such for Exemption 7 purposes by virtue of being incorporated into other kinds of records, it distinguished the case of internal agency records, which can lose their exempt status under Exemption 5, 5 U.S.C. 552(b)(5), by virtue of inclusion in final agency decisions (456 U.S. at 630). In each instance, the Court observed, the result is dictated by the purposes behind the particular exemption invoked (*ibid.*). For the reasons stated in the text, the purposes behind Exemptions 6 and 7(C) require that courts take into account the unique privacy concerns raised by large compilations of dispersed personal data.

S16504 (daily ed. Oct. 15, 1986)).¹² Rather than requiring the FBI to ascertain the status of records under local laws, the courts should allow it to make a practical assessment of a disclosure's "reasonably expected" impact on privacy interests, in light of pertinent factors such as the age and notoriety of the information requested and its potential for harm. Under this standard, the assessment made by the FBI in the present case—as confirmed by the district court's de novo review—should have been upheld.

2. The court of appeals made an even more radical departure from settled law in its treatment of the "public interest" side of the balance. Rather than engaging in the straightforward weighing of competing interests that the statute calls for, the court has "go[ne] AWOL" (App., *infra*, 30a (Starr, J., concurring)), asserting that it "cannot" make any assessment of the particular public interest in the disclosure of any specific information (App., *infra*, 38a). This analysis—which the court stated (*ibid.*) would apply to Exemption 6 as well as Exemption 7(C)—is inconsistent with Congress's expressed will and conflicts sharply with what had previously been the uniform practice of the courts of appeals.

a. In *Department of the Air Force v. Rose*, *supra*, this Court reviewed the legislative history of Exemption 6 and concluded that Congress, in calling for judicial assessments of whether particular disclosures would constitute "unwarranted" invasions of privacy, intended "'* * * a balancing' of the private and public interests" (425 U.S. at 373; see *Washington Post*, 456 U.S. at 599). Although this Court has not previously had occasion to elaborate on the manner in which courts are to evaluate

¹² Section 1804(a) of the Freedom of Information Reform Act of 1986, 5 U.S.C. (Supp. IV) 552 note, expressly made these amendments applicable to pending cases. The court of appeals recognized the applicability of these provisions (App., *infra*, 14a).

the "public interest" side of this balance, it had appeared self-evident, until the decision in the present case, that this inquiry entails an assessment of the degree to which the public interest will be furthered by the release of the particular information sought, not merely the invocation of an assumed but static "public interest" in the release of *any* information in the government's possession. The courts of appeals have therefore regularly made such assessments in the course of conducting the balancing of privacy and public interests for this purpose, and the ultimate decision whether to order disclosure has often turned, at least in part, on the weightiness of the public interest in disclosure of particular information.¹³

¹³ See, e.g., *Columbia Packing Co. v. United States Dep't of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977); *Aronson v. United States Dep't of HUD*, 822 F.2d 182, 185-186 (1st Cir. 1987); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 220-221 (3d Cir. 1977); *Core v. United States Postal Service*, 730 F.2d 946, 948-949 (4th Cir. 1984); *Heights Community Congress v. Veterans Administration*, 732 F.2d 526, 529-530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984); *Minnis v. United States Dep't of Agriculture*, 737 F.2d 784, 786-787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Campbell v. United States Civil Service Comm'n*, 539 F.2d 58, 62 (10th Cir. 1976); *Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985). Indeed, the District of Columbia Circuit has engaged in such analysis on many occasions. See, e.g., *Senate of the Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (1987). The panel majority in fact recognized that "[p]rior cases of this circuit have purported to appraise and value the public interest in specific information sought" (App., *infra*, 37a (footnote omitted)), but apparently those cases now stand overruled. The court of appeals has subsequently reaffirmed its new position that "the phrase 'public interest' does not mean 'anything more or less than the general disclosure policies of the statute.'" *Ostrer v. FBI*, slip op. 8; accord *United States Dep't of the Air Force v. FLRA*, No. 87-1143 (7th Cir. Jan. 27, 1988), slip op. 7.

The court of appeals here rejected this approach to public interest analysis under FOIA, stating that it found the assessment of the public interest in particular cases “awkward[]” and doubted its authority to make such “idiosyncratic determinations” (App., *infra*, 23a).¹⁴ But the difficulty of evaluating the public interest does not give the courts license to ignore Congress’s instruction to engage in a meaningful balancing of the interests at stake, which inevitably includes an assessment of the public interest favoring disclosure of particular information.¹⁵ As the Senate report discussion of Exemption 6 states, “[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either.” S. Rep. 813, 89th Cong., 1st Sess. 3 (1965), quoted in *Rose*, 425 U.S. at 373 n.9.¹⁶

¹⁴ One of the reasons cited by the court of appeals for its refusal to make such assessments is its inability to “foresee * * * how the information will eventually be used” and its conclusion that the purposes of the particular requester are irrelevant (App., *infra*, 38a; see also *id.* at 23a-26a). Although we agree with the court’s view that the Exemption 6 or Exemption 7(C) balance does not vary from case to case depending on the identity of the requester, it is a far different proposition to say that the “public interest” side of that balance does not vary from case to case depending on what information is sought. Even if the nature and purposes of a *particular request* are legally irrelevant to analysis under Exemptions 6 and 7(C), a court can and should make an assessment of the public interest in the disclosure of *particular information* to “any person” (5 U.S.C. 552(a)(3)) on demand.

¹⁵ The court of appeals went as far as speculating that the “public interest” may be so inherently vague a legal standard that it cannot be applied by the federal courts without exceeding constitutional limitations on the role of the judiciary (App., *infra*, 23a). Congress, however, has certainly assumed to the contrary; a LEXIS search reveals that this phrase occurs more than a thousand times in the present United States Code.

¹⁶ The court of appeals went particularly far astray when it claimed (App., *infra*, 39a n.3; cf. *id.* at 25a & n.18, 39a & n.2) that its analysis

The court of appeals was not the first to observe that the public interest in disclosure of particular information may be difficult for the judiciary to measure. The court’s concern about the awkwardness of judicial appraisals of the public interest was recognized—and answered—almost a century ago (*Warren & Brandeis, The Right of Privacy*, 4 Harv. L. Rev. 193, 214 (1890) (footnote omitted)):

The right to privacy does not prohibit any publication which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest. There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law,—for instance, in that large class of cases in

was supported by *FBI v. Abramson*, 456 U.S. 615 (1982). Although this Court did state in *Abramson* that “Congress * * * did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis” (456 U.S. at 631 (footnote omitted)), the Court certainly did not mean to disparage case-by-case balancing in the interpretation of the phrase “unwarranted invasion of personal privacy” in Exemptions 6 and 7(C). Rather, as Judge Starr pointed out (App., *infra*, 32a-34a), this Court made the quoted statement *after* observing (456 U.S. at 623) that it was undisputed in *Abramson* that the requested disclosure would be an unwarranted invasion of personal privacy. The Court found case-by-case balancing to be inappropriate in determining whether the requested records were “compiled for law enforcement purposes” (5 U.S.C. 552(b)(7)), not in determining whether law enforcement records met the other requirements of Exemption 7. Indeed, it was just one week before deciding *Abramson* that this Court emphasized—in a unanimous decision—the vital importance of judicial balancing to proper application of FOIA’s invasion-of-privacy exemptions. *United States Dep’t of State v. Washington Post Co.*, *supra*.

which the reasonableness or unreasonableness of an act is made the test of liability.

See also, e.g., *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 757-761 (1985) (plurality opinion) (requiring courts to determine, for purposes of First Amendment law, whether particular publications are on matters of "public concern"); *Connick v. Myers*, 461 U.S. 138, 143 & n.5 (1983) (same); *Rankin v. McPherson*, No. 85-2068 (June 24, 1987), slip op. 6 (same); cf., e.g., *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979) (requiring courts to balance the public interest against private interests in particular cases in order to determine whether grand jury transcripts should be publicly released). The notion that courts "cannot" measure the public interest in disclosure of particular information and are therefore excused from that congressionally assigned task (App., *infra*, 38a) is thus a marked departure from traditional jurisprudence.¹⁷

¹⁷ The court of appeals did not claim any specific support in the language or legislative history of FOIA for its holding that courts should not measure the public interest favoring disclosure in particular cases. There is no reason whatever to suppose that Congress was as reluctant as the court of appeals to assign that task to federal judges in the invasion-of-privacy exemptions of FOIA. Ironically, the same court that was so adamant in this case about the limited or nonexistent capacity of federal judges as such to make assessments of the public interest has more recently issued a ringing defense of the capacity and perceived duty of federal judges to make—as part of the Exemption 6 inquiry—assessments of the likelihood that official disclosure of an Iranian official's status vis-à-vis U.S. citizenship will or will not lead to death or serious harm to that official within Iran. *Washington Post Co. v. United States Dep't of State*, No. 84-5604 (Feb. 5, 1988), slip op. 9-16; see, e.g., *id.* at 15 n.63 (quoting legislative history praising "wisdom and good judgment" of the judiciary and indicating that judiciary is to be "trusted to act in the public interest").

b. As the dissent below noted, "there is meaning in the public-interest standard" (App., *infra*, 45a (Starr, J., dissenting)). There are ways—rejected by the panel majority—in which a court can give structure to this analysis and avoid the standardless inquiry that troubled the court here. One basic line of demarcation was suggested by this Court in *Rose*. As the Court noted in that case, "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny'" (425 U.S. at 372 (quoting court of appeals opinion, 495 F.2d at 263)). As the Court has elsewhere elaborated, that "basic purpose" of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Accordingly, several courts of appeals have indicated that the "public interest" side of the balancing under Exemption 6 is to be assessed in light of these "basic purposes" of FOIA.¹⁸ Such considerations are, as the dissent

¹⁸ See *Columbia Packing Co. v. United States Dep't of Agriculture*, 563 F.2d at 499; *Committee on Masonic Homes v. NLRB*, 556 F.2d at 220; *Minnis v. United States Dep't of Agriculture*, 737 F.2d at 787; *Cochran v. United States*, 770 F.2d at 956; see also Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596, 606-610 (1976) (proposing such a test). The District of Columbia Circuit itself had previously suggested that "the public interest considerations" supporting disclosure in particular cases, even if not "limited to those at the core of the Act," at least varied from case to case and were strongest when a grant of the FOIA request would serve the Act's basic purpose rather than "the more general public interest in disclosure." *Ditlow v. Shultz*,

below indicates, directly pertinent to disclosure requests such as the one at hand: "Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest — one that overcomes the substantial privacy interest at stake — in the rap sheet of a public figure or an official holding high government office" (App., *infra*, 45a (Starr, J., dissenting); cf. Warren & Brandeis, *supra*, 4 Harv. L. Rev. at 215-216 (making similar point)). Likewise, the age and type of offenses reflected in a rap sheet are "powerfully relevant" to a sensible ascertainment of whether there is any real "public interest" in disclosure (App., *infra*, 31a (Starr, J., concurring)). As the dissent below concluded, an assessment of these factors in the present case reveals that there was at most a "limited public interest" in the disclosure of the information sought (*id.* at 49a (Starr, J., dissenting)).¹⁹

517 F.2d 166, 172 (1975); see *Ariefff v. United States Dep't of the Navy*, 712 F.2d 1462, 1468 (1983). According to the decision below, however, the more general interest is *all* that a court may consider.

¹⁹ The court below maintained that "the government is utterly incapable of explaining to us why the information sought here does not serve the Act's 'core' policy" (App., *infra*, 38a). We respectfully disagree. Public disclosure of the criminal records (if any) of Charles Medico would not serve the Act's core policy because Charles Medico is not himself a public official, and, although he is alleged to have had dealings with a former public official, no Medico "financial crime" records that arguably might bear on that official's discharge of the functions of government exist. In the absence of any other alleged connection of Charles Medico to the functioning of our government, it seems quite plain that nothing in his criminal records (if any) would aid an informed citizenry in the exercise of democratic political choices. Likewise, we would indeed "seriously argue[] in an appropriate case 'that as a matter of law an 'informed citizenry' should

The decision below, by refusing to evaluate the public interest in disclosures of particular information in light of the basic purposes of FOIA, conflicts with the decisions of the other courts of appeals cited above. As a result, moreover, it would permit — virtually automatically — the disclosure of arrest records, or any of a wide variety of personal records compiled by the federal government, about "one's otherwise inconspicuously anonymous next-door neighbor."²⁰ The ruling, if followed, would also predictably lead to wide-scale use of FOIA by employers, credit bureaus, and others as a routine check on individuals, making the federal government, in the words of the dissent below, "*the clearinghouse for highly personal information*" (App., *infra*, 48a (Starr, J., dissenting)). This Court should grant certiorari in this case to correct the serious errors of the District of Columbia Circuit's analysis, and "restore stability and common sense to this vital area of our law" (App., *infra*, 66a).

have available to it arrest records two years old but not five or ten" (*ibid.*). A court can draw a line even when it is not a bright line or the only possible line.

²⁰ The dissent below summarized information that we supplied in our petition for rehearing concerning such matters (App., *infra*, 48a (Starr, J., dissenting)):

Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Urban Development maintains data on millions of home mortgages, that are presumably "public records" at county clerks' offices.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1988

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 85-6020, 85-6144

**THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., APPELLANTS**

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL. (Two Cases)

**Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 79-03308)**

Argued Oct. 15, 1986
Decided April 10, 1987

Before: STARR and SILBERMAN, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Concurring opinion filed by Circuit Judge STARR.

SILBERMAN, Circuit Judge:

This appeal is from a summary judgment entered by the district court dismissing a suit brought by Robert Schakne, a CBS News correspondent, and The Reporters Committee

(1a)

for Freedom of the Press ("Reporters"), an association of journalists, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(B) (1982). Reporters and Schakne sought to compel the Department of Justice and the Federal Bureau of Investigation to produce "any records indicating any arrests, indictments, acquittals, convictions and sentences of Phillip Medico, Charles Medico, or Samuel Medico, by state, local or federal law enforcement agencies or courts."¹ But Reporters and Schakne limited their request to documents containing information that was a "matter[] of public record."

Schakne's original FOIA request, filed with the Department of Justice on February 3, 1978, was not so limited, and sought in addition records on William Medico, the deceased brother of the above-named individuals. When the request was denied Schakne sent letters of appeal to the Department of Justice Office of Privacy and Information Appeals, stating for the first time that "most, if not all, of the requested documents would be on the public record in the jurisdiction in which the criminal justice procedures were invoked." On June 14, 1978, Quinlan Shea, director of the office, affirmed the denial with respect to the living individuals, citing FOIA privacy Exemptions 6 and 7(C). Shea, however, modified the initial denials by ordering the release of records relating to the deceased

¹ Information of the type Reporters and Schakne seek might be kept in twenty different offices or components of the Department of Justice. The Criminal Division, the Drug Enforcement Administration, and the Federal Bureau of Investigation are examples. The FBI alone maintains four separate records systems containing information relating to criminal investigations: the FBI Identification Division Records System; the Central Records System; the National Crime Information Center; and the Electronic Surveillance Indices.

William Medico. Schakne thus received what was purported to be the only record the Department of Justice and the FBI had on William Medico: his "rap sheet."²

Reporters also filed a request with the Department of Justice on September 21, 1978, calling for the same documents sought by Schakne. The request was denied, the denial appealed, and on January 15, 1979, the Office of Privacy and Information Appeals affirmed the denial in full, citing Exemption 7(C), and Exemption 3 in conjunction with 28 U.S.C. § 534(b) (1982). On March 13, 1979, in response to an inquiry by CBS News, Attorney General Griffin Bell explained that while "criminal history contained in *other* Department of Justice files might be released if not otherwise exempt under the Freedom of Information Act," the Department of Justice was "prohibited by statute and case law from releasing . . . 'rap sheets,'" and therefore rap sheets were exempt under Exemption 3. The June 14, 1978 release of the deceased William Medico's rap sheet was described as a mistake—the result of earlier confusion over the Department's position.

Attorney General Bell's letter did not fully explain the Department's policy regarding release of rap sheets. Ap-

² Rap sheets, or "identification records," are FBI records on individuals whose fingerprints have been submitted to the FBI in connection with arrests and, in certain instances, employment, naturalization and military service. See 28 C.F.R. § 16.31 (1986). A rap sheet typically contains information concerning an individual's arrests, indictments, convictions and imprisonments, and a notation of the source of the information. The FBI Identification Division does not itself generate the information on rap sheets, but rather compiles information received from local, state and other federal authorities. Rap sheets are kept in the Identification Division Records System, are copied in computerized (although less complete) form in the Computerized Criminal History files of the National Crime Information Center, and are sometimes also held in the Central Records System.

parently there are two circumstances under which the Department—despite lacking explicit statutory authorization—believes that it has discretion to release rap sheets (or the information contained on them) to private citizens. First, the Department will release rap sheets to the subject of the rap sheet, 28 C.F.R. § 16.32 (1986), because of “a determination that 28 U.S.C. [§] 534 does not prohibit the subjects of arrest and conviction records from having access to those records.” Department of Justice Order No. 556-73, 38 Fed. Reg. 32,806 (1973). Second, the Department’s regulations provide that rap sheets can be made available “[f]or issuance of press releases and publicity designed to effect the apprehension of wanted persons. . . .” 28 C.F.R. § 20.33(a)(4) (1986). This “wanted persons” exception exists, according to the Department’s brief, because it is “plainly among the ‘coordinated law enforcement activities . . .’ that § 534 was designed to facilitate.”³

³ The Department also releases rap sheets when directed to do so by statute. There are apparently four such statutory provisions. First, 28 U.S.C. § 534(a)(4) requires the Department to exchange rap sheets with “authorized officials of the Federal Government, the States, cities and penal and other institutions.” Second, the Department of Justice’s 1973 Appropriations Act provided for “the exchange of identification records with officials or [sic] federally chartered or insured banking institutions . . . and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing. . . .” Act of October 25, 1972, Pub.L. No. 92-544, 86 Stat. 1115 (1972). Third, the Attorney General is authorized to “process” specified inquiries (accompanied by fingerprints) submitted by private entities in the securities industry. Securities Acts Amendments of 1975, § 14, 15 U.S.C. § 78q(f)(2) (1982). Finally, the Attorney General has similar authority with respect to inquiries by applicants for registration with the Commodities Futures Trading Commission. Futures Trading Act of 1978, § 17, 7 U.S.C. § 12a(1) (1982).

Reporters and Schakne were not satisfied with the government’s response, and filed suit on December 7, 1979. On October 1, 1981, the court ordered the Department to file a Vaughn index detailing the exact nature of the documents being withheld, and an affidavit explaining, *inter alia*, the extent of the search conducted on behalf of Reporters and Schakne. In response to the court’s order, the FBI conducted an “expanded” search of its Central Records System, discovered an additional document that made references to the deceased William Medico, and released the document. But the FBI refused to submit an index of the records withheld, explaining in an affidavit that public acknowledgment of the mere existence of such information requested by Reporters and Schakne might constitute a clearly unwarranted invasion of the subject’s personal privacy.

While the suit was pending, Phillip and Samuel Medico died, leaving only one subject of the request—Charles Medico—still living. On April 29, 1983, the chief of the FBI’s Freedom of Information—Privacy Acts Section, Records Management Division sent Reporters and Schakne letters indicating that since Phillip and Samuel Medico had died, the FBI would release “any FBI records responsive to [the] FOIA request” concerning the two—in order “[t]o be consistent” with the previous release of the records of the deceased William Medico. Insofar as this decision offered release of rap sheets of deceased subjects, it was plainly inconsistent with the Department’s position that the Department was prohibited from releasing rap sheets to third-party members of the general public. The Department’s brief explains the action as an effort to “largely moot the present controversy.” The FBI attached to the letters copies of a document from the Central Records System containing references to Phillip Medico,

and revealed that in fact there were no rap sheets on Phillip or Samuel Medico. With regard to Charles Medico, the still living subject of the request, the FBI partially abandoned the Department's earlier position that the records (other than rap sheets) were exempt from release under Exemption 7(C), and stated "any financial crime information which might be contained in the FBI Central Records System could be disclosed in the public interest." No such information was released, however, because none existed. The Department of Justice Criminal Division and the Drug Enforcement Administration also wrote similar letters on the same date to Reporters and Schakne, indicating that no records at all had been found on Phillip and Samuel Medico, and that no "financial crime information" had been found on Charles Medico.

The district court then dismissed the suit. The only records the Department still refused to release (or acknowledge the existence of) were Charles Medico's rap sheet and records (other than rap sheets) containing "non-financial crime" information on Charles Medico. The court held that Charles Medico's rap sheet would be exempt from disclosure under FOIA because 28 U.S.C. § 534 was an Exemption 3 withholding statute that "specifically exempt[s]" rap sheets from disclosure by requiring they "be withheld from the general public in such a manner as to leave no discretion on the issue." Further, after reviewing an *in camera* submission by the government, the court held that any other records on Charles Medico containing "non-financial crime" information would be exempt from release under FOIA privacy Exemptions 6 and 7(C).

I.

Normally, when we construe statutes first interpreted by executive departments or independent administrative

agencies we are obliged to give deference to the department or agency interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). That is so because Congress is presumed to delegate to expert agencies, and not to the judiciary, the authority to reasonably define and apply less than precise statutory terminology, *id.* at 844, 865 – unless the legislative history of a particular statute carries a specific intent. *Id.* at 842, 104 S.Ct. at 2781. FOIA, however, is an unusual statute; it applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation. Moreover, since the statute's purpose – disclosure of certain information held by the government – creates tension with the understandable reluctance of government agencies to part with that information, Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with that statutory purpose. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 30 (1966), U.S. Code Cong. & Admin. News 1966, p. 2418 (court not "restricted to sanctioning agency discretion").

Many statutes other than FOIA bear upon the government's authority to disclose information to the public. In the absence of FOIA we would, pursuant to *Chevron*, defer to an agency's reasonable interpretation of such statutes. FOIA, however, directs federal agencies to comply with "any request for records," 5 U.S.C. § 552(a)(3) (1982), and by Exemption 3 excludes from its coverage only matters that are:

specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular

criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3) (1982) (emphasis added).⁴ Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated “specifically” with “explicitly.” *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S.Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). “[O]nly explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.” *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose to exempt matters from disclosure in the actual words of the statute (or at least in the legislative history of FOIA, see *CIA v. Sims*, 471 U.S. 159, 105 S.Ct. 1881, 1887 n. 11, 85 L.Ed.2d 173 (1985)) – not in the legislative history of the claimed withholding statute, nor in an

⁴ The proviso was added to Exemption 3 in 1976, by the Government in the Sunshine Act, Pub.L. No. 94-409, § 5(b), 90 Stat. 1247 (1976). It was a result of congressional dissatisfaction with the broad scope given the exemption by the Supreme Court in *FAA v. Robertson*, 422 U.S. 255, 95 S.Ct. 2140, 45 L.Ed.2d 164 (1975), which held that a statute qualified under Exemption 3 because it directed the agency to withhold a wide variety of information whenever, in the judgment of the agency, release would adversely impact someone objecting to its release. See H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25 (1976). See also *American Jewish Congress v. Kreps*, 574 F.2d 624, 627-28 (D.C.Cir. 1978).

agency’s interpretation of the statute.⁵ Quite apparently, Congress was well aware of modes of statutory interpretation that agencies and courts use to divine congressional intent – and wished, at least for the purpose of applying Exemption 3, to confine us essentially to the traditional plain meaning rule.

The government claims 28 U.S.C. § 534 qualifies as a withholding statute under Exemption 3. That statute reads in relevant part:

(a) The Attorney General shall –

(1) acquire, collect, classify, and preserve identification, criminal identification, crime and other records;

....

(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation, if dissemination is made outside the receiving departments or related agencies.

28 U.S.C. § 534 (1982) (emphasis added.).⁶ As seems obvious, subsection (a) does not specifically exempt from

⁵ Nonetheless, it may be proper to give deference to an agency’s interpretation of what matters are covered by a statute, once the court is satisfied that the statute is in fact an Exemption 3 withholding statute, i.e., that it meets both the threshold test and one prong of the proviso. See *Church of Scientology of California v. IRS*, 792 F.2d 153, 167-70 (D.C.Cir.1986) (Silberman, J., concurring), cert. granted, ___ U.S. ___, 107 S.Ct. 947, 93 L.Ed.2d 996 (1987); *id.* at 162-63 n. 4.

⁶ The origins of this statute trace back to 1924, when Congress first appropriated funds to the Department of Justice for “the acquisition, collection, classification, and preservation of criminal identification

public disclosure any matter. It only authorizes the Attorney General to collect information and exchange that information with other federal and state officials. The government's contention that subsection (b), which authorizes the Attorney General to stop exchanging information with a particular governmental entity *if that entity* discloses the information, brings the statute within Exemption 3 is unpersuasive. Subsection (b) does not speak to the Attorney General's authority to disclose or refuse to disclose to the public; only by implication does it even address the recipient agency's authority to disclose to the public.

In truth, the government's argument is based not on the statutory language, but rather on the legislative history of the statute. During debate on the House floor over the 1930 law that established the FBI's Identification Division, the sponsor of the bill explained that the criminal records would be kept by the Division "so as to be available any-

records and their exchange with the officials of States, cities, and other institutions." Act of May 28, 1924, Pub.L. No. 68-153, title II, ch. 204, 43 Stat. 205, 217 (1924) (codified at 5 U.S.C. § 300 (1934)). Congress established the FBI's Identification Division six years later, in 1930, and vested it with the "duty of acquiring, collecting, classifying, and preserving criminal identification and other crime records and the exchanging of said criminal identification records with the duly authorized officials of governmental agencies, of States, cities, and penal institutions." Act of June 11, 1930, Pub.L. No. 71-337, ch. 455, 46 Stat. 554 (1930) (codified at 5 U.S.C. § 340 (1934)). The limitation now appearing in subsection (b) was added in 1957. Act of June 11, 1957, Pub.L. No. 85-49, title II, 71 Stat. 55, 61 (1957). Sections 300 and 340 were combined in 1966 and codified at 28 U.S.C. § 534. Act of September 6, 1966, Pub.L. No. 89-554, § 4(c), 80 Stat. 378, 616 (1966). The statute took its present form in 1982, with the addition of subsections (a)(1) and (2) regarding records to aid in the identification of deceased individuals and the location of missing persons. Missing Children Act, Pub.L. No. 97-292, § 2, 96 Stat. 1259 (1982).

where in the United States." 72 Cong.Rec. 1989 (1930) (statement of Rep. Graham). In 1957, then FBI Director Hoover expressed concern that as the law stood the FBI might lack authority to withhold records from local officials who used them "improperly," and Congress granted him the authority by adding the language now found in subsection (b). But Hoover, who appeared to specialize in questionable disclosures of information in FBI files,⁷ surely would have been astonished to hear it contended that subsection (b) was directed at restricting the *FBI's* direct authority or power to disclose information to the public.⁸ In any event, as we have explained, legislative history will not avail if the language of the statute itself does not explicitly deal with public disclosure.

For similar reasons, we must reject the government's argument that the congressional response to a district court opinion of this circuit demonstrates that section 534 is an Exemption 3 statute. In *Menard v. Mitchell*, an in-

⁷ See generally *Intelligence Activities, Senate Resolution 21: Hearings Before the Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities*, 94th Cong., 1st Sess. (1975) (Vol. 6, Federal Bureau of Investigation).

⁸ Hoover also stated: "I feel these records should be inviolate and they should not be used for political or personal gain of any kind. Certainly, if the time comes when any private individual or agency can obtain the fingerprint identification record of the FBI on any individual, irreparable harm will result." *Departments of State and Justice, the Judiciary, and Related Agencies Appropriations for 1958: Hearings Before the Subcomm. on Dep'ts of State and Justice and the Judiciary and related Agencies Appropriations of the House Comm. on Appropriations*, 85th Cong., 1st Sess. 223 (1957) (statement of J. Edgar Hoover, Director, FBI). It is clear from the context of his testimony, however, that Hoover did not ask Congress to prohibit the FBI from releasing rap sheets, but rather, sought only to augment FBI power over rap sheets. Hoover's seemingly pious words to the 1957 congressional committee are particularly ironic in light of revelations in subsequent years. See *supra* note 7.

dividual who had been arrested without probable cause by local authorities in California sought to prevent the FBI from disseminating information in its criminal identification files that had been forwarded to it regarding that arrest. The district court held that section 534 left the FBI "without authority to disseminate arrest records outside the Federal Government for employment, licensing or related purposes. . . ." *Menard v. Mitchell*, 328 F.Supp. 718, 727 (D.D.C.1971), *rev'd on other grounds sub nom. Menard v. Saxbe*, 498 F.2d 1017 (D.C.Cir.1974) (footnote omitted). Congress thereafter passed an appropriations act which explicitly gave the FBI the authority the district court had found lacking in section 534, and also passed acts apparently authorizing the Attorney General to release information from rap sheets to various establishments in the securities and commodities futures trading industries. *See supra* note 3. From these developments, the government argues that Congress necessarily understood section 534 as prohibiting release of rap sheets to any recipient not expressly authorized by the statute to receive them. We disagree. Section 534 by itself may not provide the Department authorization for release of rap sheets to the general public. But here Charles Medico's rap sheet is sought under the Freedom of Information Act, and that makes all the difference: the *Freedom of Information Act* is what authorizes (and requires) the Department of Justice to release rap sheets to any requester – unless, *inter alia*, section 534 brings rap sheets under the protection of Exemption 3 by explicitly exempting them from release. We simply do not find such an express exemption in section 534 and therefore hold section 534 is not an Exemption 3 withholding statute.⁹

⁹ Even if section 534 met Exemption 3's threshold requirement ("specifically exempted from disclosure") it would not appear to

satisfy either prong of the exemption's proviso. The first prong, subsection (A), "embraces only those statutes incorporating a congressional mandate of confidentiality that, however general, is 'absolute and without exception.' " *American Jewish Congress v. Kreps*, 574 F.2d 624, 629 (D.C.Cir.1978) (footnotes omitted), and "condones no decisionmaking at the agency level" on whether to release particular records to the public. *Founding Church of Scientology of Washington D.C., Inc. v. National Sec. Agency*, 610 F.2d 824, 827 (D.C.Cir. 1979). Section 534, however, is silent with respect to the general public. The most the statute could reasonably be said to *imply* is that since it gives the Department discretion, apparently unbounded, to withhold records from authorized government officials who disseminate the records to the public, it might also give the Department discretionary authority to withhold such records directly from the general public. That the government in fact treats any such restraint as discretionary can be seen from the Department's "wanted persons" regulation and policy on release of rap sheets to subjects of the rap sheets, *see supra* p. 733, as well as its actions during the course of this litigation, *see supra* p. 733.

Equally unpersuasive seems the government's alternative argument – that section 534 satisfies the second clause of the second prong of the proviso, subsection (B), because it "applies to a well-defined system of criminal history identification records." It is of course not enough that the statute refer to particular records: it must "refer[] to particular types of matters *to be withheld*." 5 U.S.C. § 552(b)(3)(B) (1982) (emphasis added). The cases the government cites, *CIA v. Sims*, 105 S.Ct 1881 and *Irons & Sears v. Dann*, 606 F.2d 1215, are distinguishable because in each of those cases Congress expressly gave the agency discretion to withhold a category of records from the public. Here, there was no such express delegation of discretionary authority. Moreover, far from referring to a narrowly-defined category of records, section 534 appears limitless in scope: it covers "identification, criminal identification, crime and *other records*," (subsection (a)(1)) (emphasis added), as well as "information which would assist in the identification of any deceased individual" and the "location of any missing person," (subsections (a)(2) and (3)). In fact, Department counsel was unable to tell us where the outer boundary of "other records" lies.

II.

The government argues in the alternative that, even if Exemption 3 does not apply, Charles Medico's rap sheet, as well as "non-financial crime" information on records other than rap sheets, are covered by the law enforcement records privacy exemption, Exemption 7(C). This provision exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." Freedom of Information Reform Act of 1986, Pub.L. No. 99-570, § 1802 (Oct. 27, 1986) (amending 5 U.S.C. § 552(b)(7)(C)). Reporters and Schakne, on the other hand, argue that the records should be examined under Exemption 6, covering "personnel and medical files and similar files the disclosure of which would constitute a *clearly* unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(6) (1982) (emphasis added), because in their view the government has failed to make the showing necessary to meet the Exemption 7 threshold.¹⁰ As is evident from the language of the exemptions, Congress intended that it be easier for an agency to show that a record is exempt under the privacy test of 7(C) (once the agency has established that

¹⁰ Prior to the 1986 amendment of FOIA, this court held that to meet the threshold requirement for Exemption 7 a criminal law enforcement agency "must establish that its investigatory activities are realistically based on a legitimate concern that federal laws have been or may be violated or that national security may be breached. Either of these concerns must have some plausible basis and have a rational connection to the object of the agency's investigation." *Pratt v. Webster*, 673 F.2d 408, 421 (D.C.Cir.1982). The 1986 amendment altered the threshold requirements for Exemption 7 by deleting reference to "investigatory records" and replacing it with "records or information."

the record meets the Exemption 7 threshold) than for the agency to satisfy the privacy test of Exemption 6. Although the district court found the records Reporters and Schakne seek were acquired by the Department for law enforcement purposes and therefore meet the Exemption 7 threshold, we need not resolve that issue because, assuming *arguendo* that the district court was correct, we conclude the Department has failed to establish that release of the records "could reasonably be expected to constitute an unwarranted invasion of personal privacy," which of course means the Department has not made the more difficult showing required by Exemption 6 either.

We have held that the phrase "unwarranted invasion of personal privacy" requires a balancing of the "privacy interest" against the "public interest in disclosure." *Common Cause v. National Archives and Records Serv.*, 628 F.2d 179, 182 (D.C.Cir.1980) (quoting *Getman v. NLRB*, 450 F.2d 670 (D.C.Cir.1971)). See also *Lesar v. Department of Justice*, 636 F.2d 472, 486 (D.C.Cir.1980); *Fund for Constitutional Gov't v. National Archives and Records Serv.*, 656 F.2d 856, 862 (D.C.Cir.1981). The 1986 amendment to FOIA, which substituted "could reasonably be expected to" for "would" in Exemption 7(C), relieves the agency of the burden of proving to a certainty that release will lead to an unwarranted invasion of personal privacy, but does not otherwise alter the test. See 132 Cong.Rec. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy referring to S.Rep. No. 221, 98th Cong., 1st Sess. 24-25 (1983)); 132 Cong.Rec. H9462 (daily ed. Oct. 8, 1986) (statement of Rep. English); 132 Cong.Rec. S16,496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy). That balancing is to be done by the district court "de novo," 5 U.S.C. § 552(a)(4)(B), see *Department of the Air Force v. Rose*, 425 U.S. 352, 380, 96 S.Ct. 1592, 1608, 48 L.Ed.2d 11 (1976), and we give deference to the district court to the

extent the court does not "misapprehend the law or overlook a crucial policy concern." *International Bhd. of Elec. Workers, Local 41 v. Department of Housing and Urban Dev.*, 763 F.2d 435 (D.C.Cir.1985) (an Exemption 6 case).

The district court determined that any non-financial crime information on the requested records regarding Charles Medico is "personal" to him, meaning presumably that he has a privacy interest in it. Further, the court concluded that "it seems highly unlikely" that such information has any public interest, or relevance to the purpose behind Reporters' and Schakne's request — because the offenses (if any) were "minor" and occurred over thirty years ago. Reporters and Schakne argue that the district court (1) failed to consider that any privacy interest in the information sought was "sharply attenuated" by the fact that the information was "already available in the official record," and (2) undervalued the public interest that might be served by release of the records.

A. Privacy Interest

This case raises the novel question whether, and to what extent, "personal privacy" would be invaded by the Department of Justice's release of arrest, indictment, conviction and imprisonment records that are made available by municipal, state or federal agencies to any member of the general public. If there is no privacy interest at all in such records, then, of course, no privacy is invaded. The ordinary meaning of privacy suggests that Exemption 7(C) does not exempt records consisting of information that is publicly [sic] available. The first definition for "private" in Webster's Third New International Dictionary is: "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." What is encompassed by the "personal privacy"

language of FOIA is, of course, a question of legislative intent, but there is no suggestion in the legislative history of Exemption 7(C) that "privacy" as used in the exemption has other than its ordinary meaning. Congressional debate over the 1986 amendment to Exemption 7(C) merely repeated the words of the statute: "personal privacy." See, e.g., 132 Cong.Rec. S16,496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy). In opposing Exemption 7(C) in 1974 as overly narrow, Senator Hruska argued on the senate floor that "the release of any material [from FBI files] into the public domain is likely to cause embarrassment to individuals mentioned in FBI files." 120 Cong.Rec. 17,036 (1974). That at least suggests that the exemption was directed at (although in the senator's view did not adequately protect against) unwarranted release of information *not yet in* the public domain. This interpretation finds support in the 1965 Senate Report on Exemption 6,¹¹ which explained that "[t]he phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's *private affairs* from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). The

¹¹ It is appropriate to look to Exemption 6 in interpreting Exemption 7(C) because the sponsor of the amendment that led to the original Exemption 7(C) in 1974 explained on the senate floor, "By adding the protective language here, we simply make clear that the protections in the sixth exemption for personal privacy also apply to disclosure under the seventh." 120 Cong.Rec. 17,033 (1974) (statement of Sen. Hart). Although the proposal was subsequently altered by deletion of the word "clearly" in response to concerns expressed by President Ford, see 120 Cong.Rec. 33,158-59, 34,162-63 (1974), and Exemption 7(C) was amended in 1986, see *supra* p. 738, the underlying similarity between the two exemptions remains.

term "private affairs" would not seem to cover information that is legally available to the public at large.

To be sure, this court has recognized an Exemption 7(C) privacy interest in names of subjects of an FBI investigation even though the names had already been widely publicized in the media. We held that such publicity "in no way undermines the privacy interests of these individuals in avoiding harassment and annoyance that could result should the FBI confirm . . . the presence of their names in the . . . documents." *Weisberg v. Department of Justice*, 745 F.2d 1476, 1491 (D.C.Cir. 1984). The crucial difference between *Weisberg* and this case, however, is that the records in *Weisberg* related to a confidential investigation, whereas Reporters and Schakne seek records that local, state or federal political bodies have decided should be available to the public.

The government claims, nevertheless, that the same principle should apply to this type of case because it is a great deal more difficult "as a practical matter" for a requester to obtain the same public record information from the primary sources than it is to simply obtain it from the FBI's efficient record system. The requester may, we recognize, not even be aware in a given case which jurisdictions hold the records sought or indeed whether or not records exist. The subject, therefore, in the government's view, has a concern in maintaining difficulty of access to his public records. That may well be so, but it is not apparent to us how that concern equates to a "privacy" interest within the meaning of the statute, or how it would be measured. At oral argument government counsel contended that if the release of records causes any embarrassment or harm to a subject's reputation, then such release necessarily results in an "invasion of personal privacy." The privacy interest, in the government's view, is congruent with the degree of embarrassment the release of

records would cause. That argument, it seems to us, proves too much. Virtually any unflattering information, even already well-distributed in the public domain, may cause further embarrassment when reintroduced. The government's position, we concede, is attractive as a legislative policy matter. We all cherish the notion that our past mistakes will be forgotten, and most of us—particularly lawyers and judges—share a distaste for the widespread publication of such information as arrest records that will surely harm some innocent targets. But we cannot find in the FOIA or its legislative history any support for the government's expansive interpretation of privacy.¹²

Two Supreme Court decisions touch tangentially on the issue we face. In *Department of State v. Washington Post Co.*, the Court said in dicta that where information is "a matter of public record," for example, "past criminal convictions," "[t]he public nature of [the] information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a 'clearly unwarranted invasion of personal privacy [under Exemption 6] . . .,'" 456 U.S. 595, 602-03 n. 5, 102 S.Ct. 1957, 1961-62 n. 5, 72 L.Ed.2d 358 (1982). This seems to imply the existence of a low-level privacy interest in criminal records *despite* their public availability

¹² The 1966 House Report on FOIA states, "The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), U.S.Code Cong. & Admin.News 1966, p. 2428. This sentence of course would not exempt *all* records "the disclosure of which might harm the individual." We believe it is similarly unsupportive of the proposition that *all* releases of records that harm an individual invade a privacy interest.

somewhere in the nation. And this proposition finds some further support in *Cox Broadcasting Corp. v. Cohn*, a case resting on the intersection between the common law of privacy and the First Amendment. There, a newspaper had published the name of a victim of a crime which it had obtained from a judicial record open to public inspection, and the Court stated, "[T]he prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record." 420 U.S. 469, 494-95, 95 S.Ct. 1029, 1045-46, 43 L.Ed.2d 328 (1975) (emphasis added). Thus, *Department of State* and *Cox Broadcasting* suggest that the initial step in an Exemption 7(C) analysis should be to determine whether the requested information is a matter of public record. If the information is truly on the public record, then the privacy interest, while not eliminated, is weakened considerably, and the privacy interest/public interest balance affected accordingly.

The phrase "public record" implies, we believe, a good deal more than that the information be available. It means that a local, state or federal political body has made an affirmative determination that criminal records must be freely available to the general public and has provided a mechanism to ensure the implementation of that policy. If a local law enforcement official provides criminal information episodically, or to only certain requesters, that, in our view, would be inadequate to cause the privacy interest in those criminal records to fade significantly. That situation comes close to *Weisberg*. Of course it also follows that if criminal records are expunged by the primary source they can no longer be regarded as public. But if, for example, a state legislature requires arrests and convictions to be recorded and made freely available to the general public, any privacy interest in those records seems insignificant. Since the district court did not consider

whether Charles Medico's criminal records, if any, are publicly available in the sense we have discussed, it "misapprehend[ed] the law," *International Bhd. of Elec. Workers*, 763 F.2d at 435; it did not focus on what the Supreme Court referred to as the "fade[d]" nature of this kind of privacy interest.

B. Public Interest in Disclosure

The public interest in disclosure arises from the public's "right to governmental information." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R.Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), U.S.Code Cong. & Admin.News 1966, p. 2428. Its measure is "the public benefit gained from making information freely available." *Board of Trade of the City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d at 398. As we noted, the district court regarded Department of Justice records (other than rap sheets) containing "non-financial crime" information on Charles Medico to be of little or no public interest, and declined to find the public interest enhanced by the purpose of the request or status of the requesters. Extending our analysis to cover rap sheets, we must decide whether this determination "misapprehends the law." *International Bhd. of Elec. Workers*, 763 F.2d at 435. We observe at the outset the awkwardness of the federal judiciary appraising the public interest in the release of government records. Normally an administrative agency would make a decision of that sort in the first instance, and a court would review it only for reasonableness. Our difficulty arises out of the dilemma Congress faced: as we discussed above, because agencies have a strong interest in preserving the secrecy of their own records and are naturally disposed to resist certain disclosures, Congress decided that the judiciary should review the propriety of an agency's withholding *de novo*, 5 U.S.C. § 552(a)(4)(B) (1982).

Reporters and Schakne ask only for records, if they exist, composed of information that local, state and federal political bodies decided to make public. We note, as did the Supreme Court, that “[b]y placing the information in the public domain . . . the State must be presumed to have concluded that the public interest was thereby being served.” *Cox Broadcasting*, 420 U.S. at 495, 95 S.Ct. at 1046. Yet the district court, after an *in camera* review, found the public interest in such records to be insignificant—because the records sought presumably relate to crimes or possible crimes that were “minor,” and because the events occurred some years ago. We, however, believe the district court should first have looked to state determinations of the “public interest.” If the records contain entries drawn from state public records of the kind we have discussed, it would seem anomalous and indeed unseemly for a federal judge to, in effect, overrule a state political body’s determination that publication *is* in the public interest.¹³ We see no principled basis by which a court can determine that a crime is so “minor” that information regarding it, which a state considered significant enough to place on the public record, is in reality of little public interest.¹⁴ Nor can we say that an older public record has lost its public interest—old records may have historical importance. To be sure, as newspaper readers we might opine that one story is more *interesting* than

¹³ Our concurring colleague apparently regards this kind of deference to the political determinations of mere state legislatures as *lèse majesté*. We, on the other hand, are less confident of our ability as judges to so precisely perceive the public interest.

¹⁴ With all respect to our concurring colleague, this is not a case about traffic tickets. *But see* Concurring Opinion at 5. And even if we felt competent to label the recorded offenses as of little public interest, which we do not, we would also likely recognize that any privacy interest in such information would be equally inappreciable.

another, or even more politically significant. But surely Congress could not have intended federal judges to make such idiosyncratic determinations. Indeed, had Congress done so, the task thus entrusted to the federal judiciary might arguably exceed Article III limitations. *See Keller v. Potomac Electric Co.*, 261 U.S. 428, 440-44, 43 S.Ct. 445, 447-49, 67 L.Ed. 731 (1923). *See also Illinois v. United States*, 460 U.S. 1001, 1004-06, 103 S.Ct. 1240, 1242-43, 75 L.Ed.2d 472 (1983) (Rehnquist, J., dissenting). It follows then that we should seek objective indications of the public interest against which to balance whatever privacy interests are at stake. We conclude, therefore, that when political bodies have determined the records at issue do have a continuing public interest, the federal judiciary is not in a position to dispute or minimize that determination.¹⁵

Reporters and Schakne argue that the public interest is enhanced because the records are sought by representatives of the news media, for the purpose of aiding their private investigation of an allegedly corrupt U.S. congressman. Charles Medico, we are told, worked for a company that received federal funds via dealings with this congressman, and thus Charles Medico’s criminal records might provide clues for the investigation. The court, however, cannot inquire into the occupation of the requester when determining whether a record is exempt under FOIA. The statute indicates on its face that information is to be made available equally to all, by stating

¹⁵ Congress could of course decide the public ought not have access to federal compilations of public criminal records. Congress has considered such a possibility in the past, and might do so again. *See, e.g.*, *Dissemination of Criminal Justice Information: Hearings on H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575 Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1973).

that agencies shall make records available "to any person." 5 U.S.C. § 552(a)(3) (1982). See *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 n. 14 (D.C.Cir.1970); *Sterling Drug Inc. v. Federal Trade Comm'n*, 450 F.2d 698, 704 n. 4 (D.C.Cir.1971). The legislative history of FOIA confirms that Congress' intention was to "eliminate[] the test of who shall have the right to different information." S.Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). "[T]he Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). FOIA thus "precludes consideration of the interests of the party seeking relief," *Soucie v. David*, 448 F.2d 1067, 1077 (D.C.Cir.1971), and "[t]he focus is not on the applicant but on an abstract person. . . ." *Sterling Drug*, 450 F.2d at 704 n. 4. "Congress granted the scholar and the scoundrel equal rights of access to agency records." *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C.Cir.1986). Cf. *National Treasury Employees Union v. Griffin*, 811 F.2d 644, 649 (D.C.Cir.1987) ("legislative history of [FOIA] *fee waiver* provision indicates special solicitude for journalists" (emphasis added)); Freedom of Information Reform Act of 1986, Pub.L. No. 99-570, § 1803 (Oct. 27, 1986) (to be codified at 5 U.S.C. § 552(a)(4)(A)(ii)(II)).

For similar reasons, the court should not attempt to determine the public interest in release of criminal records based on the specific purpose of the request. Certainly the requesters' goal in this case, exposing "the potential abuse of government funds," is of public interest—but the difficulty is that the public interest does not stop there. We as judges are unable to distinguish between the public interest in different criminal records based on the specific intent

behind the request, or, for that matter, normally, the identity of the subject of the criminal record.¹⁶ This circuit did follow a different approach in *Getman v. NLRB*, an Exemption 6 case in which NLRB records were sought by university professors to aid their study of the agency. The court evaluated the public interest by weighing the purpose of the study and even the quality of the study itself. 450 F.2d 670, 675 (D.C.Cir.1971). See also *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C.Cir.1974). But the Supreme Court in *FBI v. Abramson* rejected the *Getman* approach,¹⁷ stating flatly, "Congress did not differentiate between the purposes for which information was requested." 456 U.S. 615, 631 102 S.Ct. 2054, 2064, 72 L.Ed.2d 376 (1982).¹⁸ If a record must be released under FOIA when requested by a news reporter for the purpose of publication, it must be released upon request of an ordinary citizen. Thus, Reporters' and Schakne's precise journalistic purpose in seeking the records is irrelevant to a determination of the public interest under Exemption 7(C). Cf. *Griffin*, at 649 ("furnishing

¹⁶ In *Stern v. FBI*, this court did distinguish between the public interest in the identity of a high-level FBI employee who knowingly obstructed justice and that of low-level FBI employees who only inadvertently contributed to the wrongdoing. *Stern v. FBI*, 737 F.2d 84, 93-94 (D.C.Cir.1984). We are of course bound by *Stern*, but do not believe its holding governs this case.

¹⁷ To be sure, *Abramson* was an Exemption 7 case, and *Getman* Exemption 6. But *Abramson* relied on *Sears* for this proposition—and *Sears* is an Exemption 5 case. Thus the Court in *Abramson* appeared to refer to the FOIA as a whole, not just Exemption 7. In any event, see *supra* note 11.

¹⁸ The concurring opinion apparently believes the Supreme Court's language overly broad. See Concurring Opinion at 745. We take the Court to disapprove of the very kind of ad hoc "judicial weighing of the benefits and evils of disclosure" reflected in some past opinions of this court on which our colleague relies. *Abramson*, 456 U.S. at 631, 102 S.Ct. at 2064.

journalists with information will *primarily* benefit the general public" (emphasis added)). And, therefore, the district court also was in error because it based its determination of the public interest partly on a finding that the records sought "are completely unrelated to anything now under consideration by the plaintiffs." Indeed, this approach would seem to place the district court in a role somewhat akin to that of an editor. Reporters and Schakne revealed the focus of their investigation, and the court declared the information sought was irrelevant—in effect deciding what was or was not important to their story. Rather, the district court should have determined only the interest of the general public in release of the records themselves.

* * * *

We therefore remand this case to the district court to make a determination as to whether the Department of Justice holds criminal record information that, in accordance with our opinion, must be disclosed. Since appellants would be entitled only to information on Charles Medico that is a matter of public record, the Department would of course not be obliged to disclose any other information if exempt under 7(C). If it is for any reason unclear as to whether information held by the Department is publicly available at the original source, the district court should consider whether the Department might satisfy its obligation under FOIA, if it so proposes, by merely referring appellants to the law enforcement agency that provided the information to the Department.¹⁹

It is so ordered.

¹⁹ Reporters and Schakne have asked for an award of litigation costs and attorneys fees pursuant to 5 U.S.C. § 552(a)(4)(E) (1982). On remand, the district court should determine whether plaintiffs have "substantially prevailed," and if so, whether an award "is necessary to implement the FOIA." *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C.Cir.1977). See also Weisberg, 745 F.2d at 1498.

STARR, Circuit Judge, concurring in the judgment and concurring in part:

I concur in the judgment to remand to the District Court for its reassessment of the privacy interest-public interest balance. I also concur in all of the court's opinion save for section II B. For the reasons that follow, I believe the public-interest analysis contained in that section is flawed.¹ Specifically, I find the majority's approach to collapse improperly a Congressionally-mandated balancing process into a single-factor test; in the process of this curious metamorphosis, the majority has, with all respect, ignored a number of factors that should figure into a proper assessment of the public interest.

The dominant objective of FOIA is, of course, disclosure, as the court rightly recognizes. See Opinion at 734. But Congress has also determined that under certain circumstances the public's right of access should yield to legitimate privacy interests. Exemption 7(C) sets forth one such circumstance. As recently amended by the Freedom

¹ Were we writing on a blank slate, I would also conclude that, by virtue of the care and rigor with which Attorney General Bell and other high ranking officials of the Department analyzed section 534, *Chevron*-style deference would be appropriate so as to trigger Exemption 3. Indeed, the principle of judicial deference to reasonable administrative interpretations of ambiguous statutes is particularly forceful where, as here, that interpretation has been rendered by the head of the Executive Branch Department charged with the statute's application after a careful and painstaking deliberative process. Cf. *Church of Scientology v. IRS*, 792 F.2d 153, 164 (D.C.Cir.1986) (Silberman, J., concurring), cert. granted, ___ U.S. ___, 107 S.Ct. 947, 93 L.Ed.2d 996 (1987). But at this point, too much water is over the dam in the way of FOIA caselaw to examine what should be an interplay between the clear strictures of *Chevron* and the exacting demands of FOIA decisional law.

of Information Reform Act of 1986, Exemption 7(C) shields from disclosure

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.

5 U.S.C. § 552(b)(7)(C) (codification of Pub.L. No. 99-570, § 1802 (Oct. 27, 1986)). There can be no doubt that on its face the FOIA request here seeks “law enforcement records or information.” See J.A. at 14 (original FOIA request).

Unlike many of the other FOIA Exemptions, literal compliance with the terms of Exemption 7(C)—that is, a finding that the requested information was “compiled for law enforcement purposes”—leads not to automatic withholding but rather triggers a balancing process. See *Lesar v. Department of Justice*, 636 F.2d 472, 486 n. 80 (D.C.Cir.1980); cf. 2 J. O'Reilly, *Federal Information Disclosure* § 16.07, at 16-19 (1985) (discussing this aspect of analogous Exemption 6). This balancing process is suggested by the language of Exemption 7(C); the choice of the term “unwarranted,” which connotes balancing, indicates that Congress impliedly directed such an approach. This assumption is confirmed by the legislative history. As the Supreme Court has noted, “[b]oth [the] House and Senate Reports can only be read as disclosing a congressional purpose . . . to require a balancing of interests.” *Department of the Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1976).² Moreover,

² *Rose* was, of course, an Exemption 6 case. Nonetheless, its teaching in this respect applies fully to the Exemption 7 setting. As Judge Wilkey aptly put it in speaking for the court in *Lesar v. Department of Justice*, 636 F.2d 472, 486 n. 80 (D.C.Cir.1980), an Exempt-

this balancing is to be conducted by the courts *de novo*. 5 U.S.C. § 552(a)(4)(B); see *Lesar*, 636 F.2d at 486; cf. *Rose*, 425 U.S. at 379, 96 S.Ct. at 1607 (Exemption 6).

Thus, it is hardly surprising that a balancing requirement is firmly embedded in the law of this circuit. In *Baez v. Department of Justice*, 647 F.2d 1328 (D.C.Cir.1980), for example, we held that to assess properly an Exemption 7(C) claim—that is, to determine whether disclosure would lead to “an unwarranted invasion of personal privacy,” 5 U.S.C. § 552(b)(7)(C)—we “must balance the privacy interest involved against the public interest in disclosure.” 647 F.2d at 1338. The *Baez* court, speaking through Judge Wilkey, then proceeded to strike the balance in favor of privacy interests, discerning in that case “no identifiable public interest in the[] materials.” *Id.* at 1338-39. But the court reached this conclusion only after examining “the other side of the balance,” namely the public interest in disclosure. *Id.* at 1338; see also *Common Cause v. National Archives and Records Service*, 628 F.2d 179, 182 (D.C.Cir.1980); *Lesar*, 636 F.2d at 486.

The court acknowledges and purports to follow this balancing requirement, even citing some of these same cases. See maj. op. at 737. In reality, however, the majority collapses the entire balancing process into a single determination, namely whether a federal or state political body determined at some time that the requested information should be “public.” See maj. op. at 740-41. I recognize this determination properly impacts both sides of the Exem-

tion 7(C) case, “Exemption 7(C) and Exemption 6 run contrary to the theory of other exemptions. Here the court is called upon to balance the conflicting interests and values involved; in other exemptions Congress has struck the balance and the duty of the court is limited to finding whether the material is within the confined category.” See also maj. op. at 738 n. 11, 742 n. 17.

tion 7(C) balance, and I agree fully with the manner in which the court has incorporated this factor into its privacy-interest analysis. See maj. op. at 738-40. But the majority has fallen into error by making this *identical* determination the *sole* feature of its public-interest inquiry. I respectfully disagree with that approach.

The majority reveals at the outset what animates its search for an easy-to-apply, single-factor test, namely, “the awkwardness of the federal judiciary appraising the public interest in the release of government records.” Maj. op. at 740. This concern sends the majority on a quest for someone to defer to, maj. op. at 738-39; and leads directly to the development of a deference-based public-interest analysis—that is, if the requested material is “information that local, state and federal political bodies decided to make public,” *id.* at 740, then a significant public interest in the material exists.

While I share the majority’s concern that the judiciary is ill-equipped to make value-laden judgment calls such as assessing the extent of the “public interest,” I am nonetheless persuaded that Congress has, in essence, put us in the business of doing just that. It is, after all, Congress that has directed the courts to engage in *de novo* balancing. See 5 U.S.C. § 552(a)(4)(B). Indeed, the majority concedes as much by noting after its reference to the awkwardness of the judiciary’s role that “Congress decided that the judiciary must review the propriety of withholding *de novo*.” Maj. op. at 740.

Thus, our duty is clear. Yet, the majority decides to go AWOL, as it were, by failing entirely to heed Congress’ directive. Instead of *de novo* balancing, the court’s “analysis” is reduced to deferential rubber-stamping. I have no doubt that the determinations of federal or state political bodies as to the “public” nature of information

should play a role, perhaps even a large role, in a proper public-interest analysis. But I am unable to conclude, as my colleagues do, that this single factor should constitute the *whole* of the analysis. The generalized policy determination that a category of materials warrants disclosure does not mean that a “public interest” within the meaning of FOIA attaches to every scrap of paper falling within that category.

In the process of championing a transformation of a two-sided balancing process into a single-factor test, the court rejects consideration of several factors that should figure in a determination of the “general public interest. See maj. op. at 742 (noting that the District Court should determine “the interest of the general public in release of the records themselves”). In the circumstances of this case, for example, it seems powerfully relevant that the offenses reflected on the requested records are minor and occurred a long time ago. A traffic ticket, let us say, scarcely partakes of the nature of an arrest, hypothetically, for murder.

So too, the specific purpose of the request should be relevant. In the context of this case, the fact that the records are sought by representatives of the media for the avowed purpose of exposing the possible misuse of government funds—rather than by some idiosyncratic individual seeking to satisfy a mere curiosity about criminal records—should be a factor in the public-interest determination. As the court candidly notes, this is exactly the approach this circuit followed in *Getman v. NLRB*, 450 F.2d 670, 675 (D.C.Cir.1971), and other cases. See Opinion at 742 (citing *Getman* and *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 77 (D.C.Cir.1974)); see also *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 866 (D.C.Cir.1981) (examining purpose for request, finding a “general public curiosity” to be insufficient).

The court, however, declines to follow these precedents, explaining its refusal by pointing to *FBI v. Abramson*, 456 U.S. 615, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982): “[T]he Supreme Court in *FBI v. Abramson* rejected the *Getman* approach.” Opinion at 742. With all respect, I can discern no such rejection in my reading of *Abramson*.

The majority’s analysis of *Abramson* is grounded upon that opinion’s statement that “Congress did not differentiate between the purposes for which information was requested.” 456 U.S. at 631, 102 S.Ct. at 2064. While on its face, this statement indeed appears to reject *Getman*’s approach, the context of the statement makes clear that the Court’s point was quite different.¹ Specifically, the *Abramson* Court was rejecting a claim that “Congress’ undeniable concern with possible misuse of governmental information for partisan political activity is the equivalent

¹ *Abramson* involved a FOIA request for documents sent by the FBI to the White House in 1969. The documents were prepared at White House request, rather than compiled for law enforcement purposes, but it was undisputed that the information reported in the documents “was originally compiled for law enforcement purposes.” 456 U.S. at 623, 102 S.Ct. at 2060. It was similarly undisputed that “disclosure of [the] information would be an unwarranted invasion of privacy.” *Id.* Thus, the only question facing the Court was whether material admittedly properly within Exemption 7(C) lost its exempt status when it was incorporated into a document that did not meet the Exemption 7 threshold requirement, namely, that it was not compiled for law enforcement purposes. The *Abramson* Court itself seemed to recognize it was facing a narrow issue: “The sole question for decision is whether information originally compiled for law enforcement purposes loses its Exemption 7 protection if summarized in a new document not created for law enforcement purposes.” *Id.* Moreover, the language relied upon by the majority is contained in a single paragraph in a section devoted to disposing of “several other arguments,” *id.* at 629, 102 S.Ct. at 2063, after the basic legal issue in the case had been discussed. See *id.* at 623-29, 102 S.Ct. at 2060-63.

of a mandate to release any information which might document such activity.” *Id.* As the Court made even more clear later in the solitary paragraph of relevance to our discussion, the contention it faced in *Abramson* was that *despite* the concession that an unwarranted invasion of privacy would result from disclosure, see *id.* at 623, 102 S.Ct. at 2060, Exemption 7 should not apply due to the purpose of the request. The Court disagreed, concluding as follows:

[T]he Act require[s] assessment of the harm produced by disclosure of certain types of information. Once it is established that information was compiled pursuant to a legitimate law enforcement investigation and that disclosure of such information would lead to one of the listed harms, the information is exempt. Congress thus created a scheme of categorical exclusion; it did not invite judicial weighing of the benefits and evils of disclosure on a case-by-case basis.

Id. at 631, 102 S.Ct. at 2064 (footnote omitted). Obviously, the Court was considering a later phase of the inquiry under Exemption 7, *after* the “harms” determination (resulting from the balancing process) had been made. See 456 U.S. at 623, 102 S.Ct. at 2060 (reporting that all parties agreed that “the disclosure of such information would be an unwarranted invasion of privacy”). At that stage—i.e., after the “harms” portion of the Exemption 7 analysis has been completed—the purpose of the FOIA requester is no longer legally relevant; for if one of the enumerated harms is present, then the exemption from mandatory disclosure is established. At that late stage, in short, there is to be no further judicial weighing of competing interests.

But the *Abramson* Court was by no means purporting to ban “judicial weighing” to determine whether one of the

listed harms is present in the first instance. One of the "listed harms" to which the Court alluded is, of course, "an unwarranted invasion of privacy." See 5 U.S.C. § 552(b)(7)(C). As we have seen, to assess this "harm," Congress has mandated that the courts engage in *de novo* balancing. Thus, *Abramson's* general statement has no bearing on what factors may be relevant to the "unwarranted invasion" determination and the public-interest assessment subsumed under that determination. Accordingly, the purpose of the request, in my view, should figure into a proper Exemption 7(C) balancing.

In sum, the majority's public-interest analysis is but a rehashing of its privacy analysis; the two determinations, required by Congress to comprise opposite sides of a *de novo* balancing process, have been collapsed into a single factor. Consistent with Congress' balancing requirement, this circuit has until today engaged in a fairly detailed assessment of the public interest, carefully calibrating the level of that interest depending on factors such as the precise information sought, *see, e.g., Stern v. FBI*, 737 F.2d 84, 93-94 (D.C.Cir.1984) (differentiating between level of public interest due to relative rank of FBI officials), and the purpose of the request, *see, e.g., Fund for Constitutional Government*, 656 F.2d at 866 ("general public curiosity" insufficient). Viewed against the backdrop of these circuit precedents, not to mention Congress' *de novo* balancing requirement, the court's deferential, hands-off approach is difficult to justify in law. Because I believe the federal courts are duty-bound, for better or worse, to perform the task Congress has assigned us, I cannot join in section II B of the court's opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-6020

**REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., APPELLANTS**

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

No. 85-6144

**REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., APPELLANTS**

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 79-03308)

On Appellees' Petition for Rehearing

Filed October 23, 1987

Before: STARR and SILBERMAN, Circuit Judges, and McGOWAN, Senior Circuit Judge.

Opinion for the Court filed by Circuit Judge
SILBERMAN.

Dissenting opinion filed by Circuit Judge STARR.

SILBERMAN, Circuit Judge: The Department of Justice, supported by an amicus curiae brief filed by SEARCH Group, Inc., has petitioned for rehearing. The government argues, *inter alia*, that the panel opinion misinterpreted the term "public interest," as used in the balancing of interests in Exemptions 6 and 7(C) of the Freedom of Information Act ("FOIA"). 5 U.S.C. § 552 (b)(6), (7)(C) (1982). The charge is that the panel incorrectly deferred to state or local government determinations that arrest or conviction records should be publicly available. Although we deny the petition for rehearing and reaffirm our prior judgment, we think the government has a valid point and therefore modify our rationale.

I.

Our opinion rejected the district court's reasoning—that there was little or no public interest in Charles Medico's rap sheet because the records sought related to minor crimes that occurred long ago. *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 740-42 (D.C. Cir. 1987). We concluded that there was no principled statutory basis to support that determination, and we said that the district court should have deferred to state or local determinations that publication of arrest or conviction records were in the public interest. *Id.* at 740-41. It is argued in the petition for rehearing, however, that such an approach could prove confusing and indeed unworkable since the district court may well encounter conflicting policies on disclosure of arrest records at the state and local level. SEARCH Group, an association of governors' appointees responsible for the operation of the agencies in their states that collect and

maintain criminal history records, has brought to this court's attention the fact that many states have policies or laws that forbid the release of their own compiled law enforcement information, which includes rap sheets. Based in part on the amicus' presentation, we now agree that our prior position on this point should be abandoned. We must thus confront two questions that we previously thought appropriate to avoid: How do we determine, as a matter of law, the public interest in disclosure of the information that appellants seek? Does FOIA require the judiciary to make an individual determination of the general public interest in information sought in every case in which a section 6 or 7(C) Exemption is asserted? *Id.* at 740-42. In answering these questions, we find no standards or guidelines drawn from the statute to inform our determination. Prior cases of this circuit have purported to appraise and value the public interest in specific information sought,¹ but in no case has this court ever articulated standards or a rationale for that process.

The government argues that the statute has a "core" purpose, *i.e.*, "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). And although the statute reaches beyond the core, the government argues, the courts should treat disclosure that serves core policies more favorably than those disclosures that do not. Over a decade ago,

¹ See *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984); *Baez v. United States Dep't of Justice*, 647 F.2d 1328, 1338-39 (D.C. Cir. 1980); *Rural Housing Alliance v. United States Dep't of Agric.*, 498 F.2d 73, 77-78 (D.C. Cir. 1974); *Getman v. NLRB*, 450 F.2d 670, 675-76 (D.C. Cir. 1971).

Judge Leventhal, speaking for this court, expressed doubt that the public interest considerations of the Act could be so limited. *Ditlow v. Shultz*, 517 F.2d 166, 172 & n.24 (D.C. Cir. 1975). It seems to us that he was quite correct. A core purpose does not, in our view, confer judicial power to predict whether particular information the government holds will, upon disclosure, aid an "informed citizenry" as to democratic political choices. Indeed, the government is utterly incapable of explaining to us why the information sought here does not serve the Act's "core" policy. The government and the panel concurring opinion argue that any convictions involved here are too old to require disclosure. *Reporters Comm.*, 816 F.2d at 745, but from what principle does that observation flow? Surely it cannot be seriously argued that as a matter of law an "informed citizenry" should have available to it arrest records two years old but not five or ten. The subjects of appellants' requests are alleged to have had dealings with government officials; it is surely up to the citizenry, once informed, to determine the relevance of the age of the arrests or convictions.

Even if we could fashion a methodology – and we firmly believe we cannot – to grade the public interest in government-held information in the abstract, we must keep in mind that we are unable to foresee or monitor how the information will eventually be used. *Ditlow*, 517 F.2d at 171 & n.18. As we have held, information disclosed to anyone must be disclosed to everyone. *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986); *Ditlow*, 517 F.2d at 171 & n.18. Therefore, a particular requester's purpose in seeking information, or his proposed use, must be wholly irrelevant to a determination of the public interest since we cannot predict how other persons, including those

to whom the requester might give the information, would use it.²

But, it might be asked, if it is impossible to judge the public interest in requested information by its proposed use or its inherent value to an informed citizenry, how then can it be judged at all? We do not think it can. We do not believe that the phrase "public interest," as used in the balancing in Exemptions 6 and 7(C) of the Act, means anything more or less than the general disclosure policies of the statute.³ Since Congress gave us no standards against which to judge the public interest in disclosure, we do not believe Congress intended the federal judiciary – when applying only Exemptions 6 and 7(C) of the Act – to

² The use test, best exemplified by *Getman*, was rejected in this circuit in *Washington Post Co. v. United States Dep't of Health & Human Services*, 690 F.2d 252, 258 & n.17 (D.C. Cir. 1982) ("the particular need of the requester is irrelevant under FOIA"); see also *FBI v. Abramson*, 456 U.S. 615, 631 (1982) ("Congress did not differentiate between the purposes for which information was requested").

³ Judge Leventhal noted that some have thought there to be a difference between the House and Senate Reports preceding passage of the Act as to the meaning of public interest. *Ditlow*, 517 F.2d at 171 n.19. The latter has been interpreted to support the notion of a public interest of varying weight. See *Getman*, 450 F.2d at 675-77. But Judge Leventhal, correctly we think, disapproved of the *Getman* approach because he realized that it implied a power in the judiciary to restrict disclosure to the requester whose use was approved – a power that Judge Leventhal concluded the judiciary lacks. *Ditlow*, 517 F.2d at 172 n.21. It appears to us that Judge Leventhal anticipated *FBI v. Abramson*, 456 U.S. 615 (1982), when he noted that "it is questionable whether Congress intended to create such a broad exception to the 'any person' provision by adopting the 'clearly unwarranted' language of exemption 6." *Ditlow*, 517 F.2d at 172 n.21. In *Abramson*, the Court held that "Congress did not differentiate between the purposes for which information was requested. . . . Congress . . . did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis." *Abramson*, 456 U.S. at 631 (citation omitted).

construct its own hierarchy of the public interest in disclosure of particular information. As we said in our panel opinion, *Reporters Comm.*, 816 F.2d at 741, such an unbounded delegation would raise serious constitutional problems. Cf. *Illinois v. United States*, 460 U.S. 1001, 1004-06 (1983) (Rehnquist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion). It is true that the Supreme Court (and this court) has held that the federal courts in applying Exemptions 6 and 7(C) must weigh the public interest against the privacy interest and determine whether disclosure would be an unwarranted invasion of the privacy interest. *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (Exemption 6); *FBI v. Abramson*, 456 U.S. 615, 631 (1982) (Exemption 7(C)). That of course means that the federal courts must, as we have done in this case, consider whether there is a cognizable privacy interest in the information sought, and then appraise the impairment to that interest that would result from disclosure. For instance, had it been shown to us that disclosure of Medico's "rap sheet" would cause him particular harm, even though his privacy interest is slight, we might well have reached a different conclusion. But, that we must balance the prospective damage to the privacy interest against the public's interest does not necessarily mean, and as we conclude, could not mean, that the public interest depends on our own appraisal of the public's need to know particular information.

II.

The petition for rehearing sharpens another argument the government previously presented: The Justice Department compilation of criminal histories, by putting the public record information in different form, somehow

changes the nature of the information sought. Our dissenting colleague now agrees with this argument. Dissent at 2. But it seems to us this argument is undermined by the government's contention, with which the dissent also agrees, dissent at 4-5, that if the Department refers a requester to the original source it provides the requester with essentially the basic information sought — at least the fact that criminal history information exists. The requester can then go to the original source and, if the information is publicly available, easily obtain it.⁴ That, of course, is true, but if such referral is tantamount to disclosure, it is abundantly clear that the form of the government's compilation of criminal histories is immaterial to the issue of whether disclosure of the facts compiled is required. Cf. *Abramson*, 456 U.S. at 624 (holding that information originally gathered for law enforcement purposes by the FBI did not lose its status under Exemption 7 because it was placed in a different compilation for a political purpose by the White House).

The government and the dissent also claim that our analysis of Charles Medico's privacy interest implies a delegation to a state or local body for a policy determination. Dissent at 1. Not so. We direct the district court only to make a factual determination in these kinds of cases: Has a legitimate privacy interest of the subject in his rap sheets faded because they appear on the public record? *Reporters Comm.*, 816 F.2d at 740. That a particular state may treat its own compilations of criminal histories drawn from public record information on file in cities and counties as confidential is irrelevant to that determination. The

⁴ If the Department knows that particular information is *not* publicly available at its source, it obviously would be inappropriate to refer a requester to the source. As we said in the panel opinion, this is an option available to the Department if it does not know one way or the other whether the information is publicly available.

district court's task is limited to determining, as a matter of fact, not law, whether, by reason of the actual practices of the jurisdiction that is the original source, the subject's privacy interest has faded. It may well be, as both the government and dissent suggest, that state statutes that limit disclosure of compilations of criminal histories are eminently sensible and should guide federal policy. But as we said in our panel opinion:

Congress could of course decide the public ought not have access to federal compilations of public criminal records. Congress has considered such a possibility in the past, and might do so again. See, e.g., *Dissemination of Criminal Justice Information: Hearings on H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575 Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1973).

Reporters Comm., 816 F.2d at 741 n.15. The point, of course, is that Congress, unlike a number of states, has chosen not to pass a statute that would establish the federal policy that appellees now urge us to announce without a legislative mandate. We decline their suggestion because we do not believe we have the authority to accept it.

Our conclusion in this case therefore does not change. We reverse and remand to the district court to determine whether the Department of Justice holds criminal record information on Charles Medico that, in accordance with our opinion, must be disclosed.

STARR, Circuit Judge, dissenting: I respectfully dissent from denial of the petition for rehearing. After reflecting on the filings, I have come to the conclusion that the panel's opinion is wrong; worse still, it will likely lead to unfor-

tunate consequences, misconstruing as it does FOIA Exemption 7(C) and, by analogy, Exemption 6 as well.

The panel opinion speaks for itself, and its rationale therefore need not be reviewed in detail. Suffice it to say that the panel majority, finding the balancing process ordained by Congress to be too "awkward," embarked on a quest for someone to defer to in making determinations under Exemption 7(C).¹ Discerning in this case a determination by political bodies that the criminal-record information sought here was to be "public," the panel accordingly found any privacy interest eviscerated; at the same time, it found a significant public interest in disclosure by virtue of these same political determinations. As my concurring opinion in the case sought to point out, this approach reflected no *de novo* balancing at all;² it was, rather, a single-factor test.

I nonetheless concurred in the judgment and indicated my general agreement with the majority's privacy-interest analysis, limiting my criticisms to its public-interest analysis. On the latter score, I wholeheartedly disagreed with my colleagues. See *Reporters Committee*, 816 F.2d at 743 (concurring opinion). Now, the filings on rehearing, including a helpful *amicus* brief surveying state legislation regarding the confidentiality of criminal histories,³ have led me to conclude that the majority's entire analysis in section II, 816 F.2d at 737-43, is flawed.

¹ The majority's analysis also impacts upon Exemption 6, as noted above. See *Reporters Committee*, 816 F.2d at 738, n.11, 742 n.17.

² See 5 U.S.C. § 522(a)(4)(B) (1982) ("In such a case the court shall determine the matter *de novo*. . . .").

³ The *amicus* brief was filed conditionally, together with a motion for leave to file, see Fed. R. App. P. 29, by SEARCH Group, Inc., the State of California Department of Justice, and the State of New York Division of Criminal Justice Services. SEARCH Group is, I gather, a

First. In its original presentation to the panel, the Government argued that while the underlying information was indeed "public" in the sense that it was on record at local courthouses or police stations, the particular items sought by appellants are of a different character by virtue of their cumulative, indexed, computerized nature. The panel opinion rejected this argument, *see Reporters Committee*, 816 F.2d at 739, concluding instead that the public availability at the "original source" was the only relevant fact. *See id.* at 743. After reviewing the rehearing petition, I am now of the view that our conclusion was wrong.

As I see it, computerized data banks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves. This conclusion is buttressed by what I now know to be the host of state laws requiring that cumulative, indexed criminal history information be kept confidential, as well as by general Congressional indications of concern about the privacy implications of computerized data banks. *See H.R. Rep. No. 1416*, 93d Cong., 2d Sess. 3, 6-9 (1974), reprinted in *Legislative History of the Privacy Act of 1974, Source Book on Privacy*, 296, 299-302 (1974).

Second. With respect to the majority's public-interest analysis, I need not restate the objections already voiced in my concurrence. Suffice it to say that the majority fails to carry out its obligation to make a separate valuation of that interest under the precedents of this circuit and the Supreme Court.

non-profit corporation, governed by a Membership Group comprised of Governors' appointees from each State. SEARCH Group deals with the collection, maintenance, and dissemination of state criminal history records. The California and New York agencies are, it appears, the entities responsible for the operation of the criminal history repository within their respective States.

The majority vigorously objects to an analysis of the public interest that depends upon the identity of the requester or the use to which the information will be put. Even granting the majority's position that calls into question a rigorous application of our court's analysis in *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971), this still does not leave the Congressionally mandated public-interest standard devoid of meaning. This is scarcely the place to speculate about the public-interest analysis in a post-*Getman* era but rather than give *Getman* no burial, I think a few words should be said out of respect.

Getman's critical insight is that there *is* meaning in the public-interest standard; the way in which meaning is imparted to that term will depend on the information that is sought and the circumstances in each case. Where what is at stake is the disclosure of personal information about a particular subject, one helpful vantage point is the public interest in the subject of the information request. Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest—one that overcomes the substantial privacy interest at stake—in the rap sheet of a public figure or an official holding high government office. For guidance in fleshing out that analysis, it seems sensible to me to draw upon the substantial body of defamation law dealing with "public personages." *See e.g., Providence Journal Co. v. F.B.I.*, 460 F. Supp. 778, 790-91 (D.R.I. 1978) (striking differing balances in an Exemption 7(C) case depending upon whether the information obtained through an illegal wiretap concerned the subject's dealings with public figures), *rev'd*, 602 F.2d 1010 (1st Cir. 1979) (holding *all* information obtained in this manner exempt from disclosure), *cert. denied*, 444 U.S. 1071 (1980). But

however fruitful that analytical mode may (or may not) eventually prove to be in the post-*Getman* era, the fundamental point is that the public interest in any particular case *can* vary beyond the "general disclosure policies of the statute," Majority Statement at 5, and is to be seriously weighed against the subject's privacy interest.⁴

Third. The Bureau and the District Court will have considerable difficulty in applying the majority's single-factor test in future cases. The rehearing filings highlight two problems.

In the first place, the Government points out that the FBI will often have no way of knowing whether a particular item in a particular criminal history compilation is, in fact, "publicly available at the original source," *Reporters Committee*, 816 F.2d at 743, without a specific inquiry to the source at the time of the FOIA request. To require the Bureau to undertake such inquiries is to impose a substantial (if indeed not crippling) administrative burden. The majority's response to this unhappy, practical result of our holding is that "the Department might satisfy its obligations under FOIA . . . by merely referring appellants to the law enforcement agency that provided the information to the Department." *Id.* (footnote omitted). In its rehearing petition, the Government suggests that this "option" is illusory; to refer a requester in the manner suggested by the majority would only confirm that criminal history information exists, which may be the most pertinent (if not the only) "fact" that a requester is seeking. Government's Rehearing Petition at 10 n.9.

⁴ I by no means suggest that the public-figure analysis will apply, much less govern, in the entire universe of Exemptions 6 and 7 (C) cases. For example, in one recent case, this court considered under the public-interest prong of the analysis the public interest in fair and honest disciplinary proceedings. *Carter v. United States Department of Commerce*, 830 F.2d 388, 390 (D.C. Cir. 1987).

In the second place, the rehearing filings make it abundantly clear that an entirely different level of "political determinations," *Reporters Committee*, 816 F.2d at 741, exists. That is, most state legislatures have expressly provided that cumulative, indexed criminal history information of the type sought here is to be held confidential. See, e.g., Cal. Penal Code § 11105 (West Supp. 1986); Conn. Gen. Stat. Ann. §§ 54-142i(c), 54-142n (West 1985); Hawaii Rev. Stat. § 846-9 (1985); Tenn. Code Ann. §§ 40-15-106(b)-(c), 40-32-101(b)-(c) (1982). The exact approach and precise degree of confidentiality, not surprisingly, varies significantly from State to State.⁵ But the common theme is nonetheless one of confidentiality.

Moreover, the majority provides no guidance to the Bureau or the District Court as to the source of law for determining whether the information is "publicly available at the original source." Often the state legislature requires both that the underlying criminal history source records be publicly available *and* that cumulative, indexed criminal history information be kept confidential. Compare Ohio Rev. Code Ann. § 1901.31(E) (Anderson Supp. 1986) (court proceedings shall be public records) with Ohio Rev. Code Ann. § 109.57(E), (D) (Anderson 1984 & Supp. 1986) (criminal history information to be held confidential). In the latter situation—which would appear to be the rule rather than the exception—I fear that the District Court will be left on remand with no criteria for determining whether the privacy interest of the subject in his rap

⁵ This fact, of course, leaves the majority vulnerable to the charge that its new deference approach is just as "idiosyncratic," see *Reporters Committee*, 816 F.2d at 741, as the previous balancing analysis, which at least had the virtue of being grounded in the statutory language (and had the virtue of extensive caselaw authority).

sheet has "faded." Majority Statement at 7-8. Instead the District Court will be left with only the majority's original direction to look to availability at the "original source," as well as the majority's initial rejection of the argument that cumulative, indexed, computerized information was somehow different.

Thus it is that I must confess that I was wrong the first time around. The rehearing filings have convinced me that the panel opinion's entire Exemption 7(C) analysis is in error. Its transmogrification of *de novo* balancing into a deference-driven, single-factor test does violence to what had heretofore been settled law. In the process, it raises the unsettling prospect of future FOIA requests tailored precisely to fall within the dictates of *Reporters Committee*. We are now informed that many federal agencies collect items of information on individuals that are ostensibly matters of public record. For example, Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Urban Development maintains data on millions of home mortgages that are presumably "public records" at county clerks' offices. Government's Rehearing Petition at 2. Under the majority's approach, in the absence of state confidentiality laws, there would appear to be a virtual per se rule requiring all such information to be released. The federal government is thereby transformed in one fell swoop into *the clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose. This Congress did not intend.*

Quite apart from the potentially daunting administrative burden this will impose, I harbor the gravest concerns that this new-fangled regime will have a pernicious effect on personal privacy interests in conflict with Congress'

express will. Congress chose not to enact separate exemptions for each set of personal files kept by the federal government, but chose instead to delegate to the courts the task of making the ultimate determination with respect to disclosure on the basis of criteria that Congress set. Surely we should not eschew this task because we find it awkward. The rehearing filings have referred the court to previously unknown legal authorities, arguing strongly that the information sought here should be held confidential. We should abandon right now our unfortunate departure from traditional FOIA analysis; having repented, we should then conduct an old-fashioned Exemption 7(C) balancing.

In that process, we would be well advised to consider these state laws as one, quite powerful factor. In carrying on the traditional Exemption 7(C) analysis I would, on reflection, conclude that the privacy interest here outweighs the limited public interest in Charles Medico. On that basis, I would affirm the District Court's judgment. As my colleagues have concluded otherwise, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 79-03308

THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF
JUSTICE, ET AL., DEFENDANTS

[Filed July 25, 1985]

ORDER

The plaintiffs filed this action pursuant to the Freedom of Information Act, 5 U.S.C. § 552. The case is now before the Court on the cross-motions for summary judgment filed by the parties. After giving careful consideration to the motions, the oppositions thereto, the arguments of counsel made on May 3, 1985, and the record in this case, the Court concludes, for the reasons set forth in the accompanying memorandum, that the plaintiffs' motion should be denied, and the defendants' motion should be granted.

In view of the above, it is hereby
ORDERED that the plaintiffs' motion for summary
judgment is denied, and it is further

ORDERED that the defendants' motion for summary
judgment is granted, and it is further

ORDERED that this case is dismissed with prejudice.

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

July 24, 1985

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-03308

THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF
JUSTICE, ET AL., DEFENDANTS

[Filed Aug. 5, 1985]

MEMORANDUM

The plaintiffs filed this action pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The case is now before the Court on cross-motions for summary judgment which were argued on May 3, 1985.

I

The plaintiffs requested the defendants to furnish the criminal records of

William Medico (deceased), Phillip Medico, Charles Medico or Samuel Medico, specifically information about any prison sentences served in federal prisons, any convictions in federal courts, any indictments by federal grand juries or any arrests by federal law enforcement authorities; additionally, information known to the Department of Justice about prison

sentences, convictions, indictments or arrests by state or local courts and law enforcement agencies involving these four persons.

Complaint Exhibit 1. Eventually, the defendants furnished the information relating to William Medico, who was deceased, but declined to furnish the requested information relating to Phillip Medico, Charles Medico or Samuel Medico. This action was filed and thereafter, Phillip Medico and Sam Medico died. The defendants noting that those persons had died since the filing of this FOIA request, advised the plaintiffs, "[w]e therefore conducted a new search of the Criminal Division central index but found no documents responsive to your request concerning these two deceased individuals. If a rap sheet had been discovered during a search of Criminal Division records, it would have been referred to the Federal Bureau of Investigation (FBI) for direct response to you under the FOIA." Notice of Filing: Defendants' Suggestion of Partial Mootness, Exhibit 2. The defendants went on to advise the plaintiffs that, "[t]he Criminal Division continues to maintain that it can neither confirm nor deny whether any other criminal information concerning a Charles Medico might be found in its records. Disclosure of any other criminal information concerning a Charles Medico would constitute either a clearly unwarranted or an unwarranted invasion of privacy". In effect, all the defendants did after the deaths of Phillip Medico and Samuel Medico, was to acknowledge that no rap sheets as to those two persons exist.

As to Charles Medico, who is living, the defendants continue to refuse to release the requested information except, that they note that the plaintiffs advise and the defendants have "administratively discerned . . . a legitimate public interest in the administrative disclosure

of 'financial crime' information'.¹ The defendants then went on to advise the plaintiffs that a review of the records revealed no "financial crime information concerning a Charles Medico".

The only issues now pending before the Court are (1) whether any criminal information which might be summarized in a 28 U.S.C. § 534 "rap sheet" should be disclosed, and (2) whether similar information found in any other non-public agency records should be disclosed in the absence of a countervailing public interest. The defendants contend that the withheld information is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3), (6), or (7)(C). This Court agrees.

II

The information contained on a rap sheet, created pursuant to 28 U.S.C. §534, is exempt from disclosure pursuant to that statute since that statute falls within the scope of FOIA Exemption 3. Exemption 3 withholds from disclosure records

Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular criteria for withholding or refers to particular types of matters to be withheld.

5 U.S.C. § 552(b)(3). Information contained in a rap sheet, prepared pursuant to Section 534, would include arrest as well as convictions. For example, in the rap sheet

¹ The plaintiffs had suggested, in some of their pleadings, the term "financial crime" as relating to bribery, embezzlement, and other financial crimes.

ultimately released relating to William Medico, it is noted that Mr. Medico was arrested in 1928 and in 1931 for suspicion of murder and a violation of the National Prohibition Act and later released, that he was arrested in 1934 on two occasions for being a "disorderly person", and was sentenced to serve time in jail, and that he was arrested in 1961 as a fugitive, but the disposition is reflected as "ignored".

The duty to compile such records is set forth in 28 U.S.C. § 534. That section provides that the Attorney General is to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records" and that he is to "exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions". Significantly, however, the section goes on to provide that "[t]he exchange of records authorized by [the section] is subject to cancellation if dissemination is made outside the receiving departments or related agencies". Section 534(b).

This Court is satisfied that pursuant to the above section, the information acquired and collected by the Attorney General may be released only to the agencies, organizations or states set forth in that section, and may not be released to the general public. Thus, the information is "[s]pecifically exempted from disclosure by statute [28 U.S.C. § 534]" which "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue". The Court therefore concludes that if the defendants have collected and maintained a rap sheet related to Charles Medico, that rap sheet is exempt from disclosure pursuant to Exemption 3. See *Krohn v. United States Department of Justice*, Civil No. 79-0667 (D.D.C. March 19, 1984). The plaintiffs are not entitled to receive the rap sheets, if any exist, and accordingly, the

defendants are entitled to summary judgment on this issue.

III

The plaintiffs also request other documents which contain information found in other non-public agency records. The Court concludes that that information is exempt from disclosure under Exemptions 6 and 7C of the FOIA (5 U.S.C. § 552(b)(6) and (7)(C)).

Exemption 6 provides that "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure under the FOIA. Exemption 7C provides that "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (C) constitute an unwarranted invasion of personal privacy" are exempt from disclosure.

For the purpose of Exemption 6, the Court is satisfied that the information found in non-public records which contains "rap sheet information" may be classified as contained in files which are "similar files", because that information is personal to the individual named therein. Clearly, there is little or no difference between that information and "personnel and medical files" as described in Exemption 6. It is also clear that the information acquired by the defendants was acquired for law enforcement purposes. The only question remaining then is whether the release of that information would constitute "a clearly unwarranted invasion of personal privacy" pursuant to Exemption 6 or a "unwarranted invasion of privacy" pursuant to Exemption 7C. The Court must therefore balance the "interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information". *Depart-*

ment of Air Force v. Rose, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604 (1976) (footnote omitted).

Under the facts of this case, the Court concludes that the material is exempt pursuant to both Exemption 6 and Exemption 7C. The plaintiffs have made known why they are requesting the information concerning Charles Medico. Here, the defendants have advised the plaintiffs that they would release any and all information concerning "financial crimes" which may have been committed by Charles Medico. Such information has been released; the defendants have advised the plaintiffs that a search of their records indicate that there is no financial crime information concerning a Charles Medico. The other information which *may* be contained in those non-public documents relating to Charles Medico *may*, if any such information exists, include criminal information on matters not related to the matter under consideration by the plaintiffs. It seems highly unlikely that information about offenses which may have occurred 30 or 40 years ago, as in the case of William Medico, would have any relevance or public interest. The same can be said for information relating to the arrest or conviction of persons for minor criminal offenses or offenses which are completely unrelated to anything now under consideration by the plaintiffs. That information is personal to the third party (Charles Medico), and it if exists, its release would constitute "a clearly unwarranted invasion of personal privacy". The Court concludes therefore that those documents and that information are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(6) and (7)(C).

In view of the above, the plaintiff's motion for summary judgment will be denied and the defendant's motion for summary judgment will be granted.

In order that the record is clear, the Court will require the defendants to file a statement, *in camera*, with the

Court in response to plaintiff's request for information concerning Charles Medico. The only reason for this direction is so that (1) the records will be before the Court of Appeals in the event of any appeal, and (2) so that the Court, after reviewing that document, if any exist, may reconsider its decision, *sua sponte*, if such action appears to be warranted. In this connection the Court's review will be limited to whether the information may be classified as financial crime information.²

An appropriate order has been issued.

Dated: August 5, 1985

/s/ John Garrett Penn
 JOHN GARRETT PENN
 United States District Judge

² The defendants shall furnish the information to the Court within ten days of the filing of this memorandum. If, after reviewing what has been furnished to the Court, the Court concludes, *sua sponte*, that it should reconsider its earlier decision, the Court will notify the parties so that the defendants will have a further opportunity to respond before such information, if any exists, is released. On the other hand, if the Court concludes that there is no need to reconsider this issue, either because no such information exists, or because such information, if it does exist, need not be disclosed pursuant to the FOIA, the Court will merely file a brief memorandum noting that it sees no reason to reconsider its decision.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-03308
 THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF
JUSTICE, ET AL., DEFENDANTS

[Filed Aug. 16, 1985]

MEMORANDUM

Pursuant to the Memorandum filed in this case on August 5, 1985, specifically slip op. 8-9, and n. 2, the parties are advised that the Court will not reconsider its decision in this case. All *in camera* submissions are sealed and made a part of the record. See Court Exhibit 1 (under seal).

/s/ John Garrett Penn
 JOHN GARRETT PENN
 United States District Judge

APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 85-6020
Civil Action No. 79-03308

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

No. 85-6144
Civil Action No. 79-03308

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., APPELLANTS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

**APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

[Filed Apr. 10, 1987]

Before: STARR and SILBERMAN, Circuit Judges, and
MCGOWAN, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District

of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the judgment of the District Court appealed from in these causes is hereby vacated and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

BY:/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Dated: April 10, 1987
Opinion for the Court filed by Circuit Judge SILBERMAN.
Concurring opinion filed by Circuit Judge STARR.

APPENDIX G**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 85-6020
Civil Action No. 79-03308

REPORTERS' COMMITTEE FOR FREEDOM
OF THE PRESS, ET AL.

v.

UNITED STATES DEPARTMENT OF
JUSTICE, ET AL.

[Filed Oct. 23, 1987]

ORDER

BEFORE: STARR and SILBERMAN, Circuit Judges;
McGOWAN, Senior Circuit Judge

Upon consideration of appellees' petition for rehearing,
the response, and the brief *amicus curiae* of Search Group,
Inc., et al., it is

ORDERED, by the Court, that the petition for rehearing
is denied, for the reasons set forth in the opinion of the
Court filed this date.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK
BY:/s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Opinion for the Court filed by Circuit Judge Silberman.
Dissenting Opinion filed by Circuit Judge Starr.
October 23, 1987

APPENDIX H

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 85-6020
Civil Action No. 79-03308

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS

v.

UNITED STATES DEPARTMENT OF
JUSTICE, ET AL.

AND CONSOLIDATED CASE NO. 85-6144

[Filed Dec. 4, 1987]

ORDER

Before: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG and SENTELLE, Circuit Judges

Appellees' suggestion for rehearing *en banc* has been circulated to the full court along with the brief for Search Group, Inc., et al., as *amicus curiae*, and appellants' brief in response to appellees' petition and suggestion. The taking of a vote on the suggestion was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellees' suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:/s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Starr, joined by Circuit Judges Bork, Buckley and Sentelle, is attached.

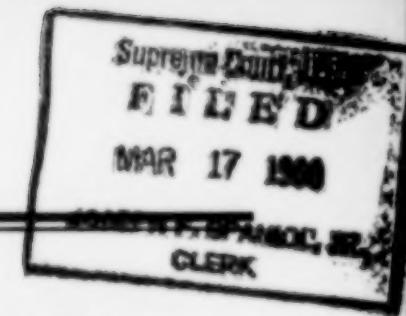
Circuit Judge D.H. Ginsburg did not participate in this order.

No. 85-6020 Reporters Committee for Freedom of the Press v. DOJ

Statement of Circuit Judge Starr dissenting from the denial of rehearing en banc, joined by Circuit Judges Bork, Buckley, and Sentelle:

The panel's decision in this case represents a clear departure from the law of this circuit. In addition, the result reached by the panel majority is profoundly wrong. Opening up the vast storehouse of computerized criminal histories to FOIA requests, regardless of how remote and negligible the public interest in such sensitive documents may be, is unfortunate and misconceived. I would grant the suggestion for rehearing *en banc* and restore stability and common sense to this vital area of our law.

No. 87-1379



IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel for Respondents

QUESTIONS PRESENTED

1. Whether an individual has a substantial privacy interest in information concerning his criminal record, when that information is already a matter of public record.
2. Whether the privacy interest in the criminal record of a principal of a government defense contractor is outweighed by the public interest embodied in the disclosure policies of the Freedom of Information Act.

(i)

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5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-1379

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,
v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In January 1978, there were several published reports that the United States Attorney in Philadelphia, David Marston, was investigating two Democratic congressmen from Pennsylvania, Joshua Eilberg and Daniel Flood, for alleged conflict of interest and corruption. C.A. App. 136. At the time, Congressman Flood was a senior member of the House of Representatives and Chairman of the House Appropriations Subcommittee. *Id.* at 137.

CBS News assigned respondent Robert Schakne, a correspondent in its investigative unit, to investigate the allegations about Congressman Flood. *Ibid.* In the course of Mr. Schakne's investigation, he learned that Congressman Flood had been instrumental in arranging certain Department of Defense contracts for Medico Industries. *Ibid.* Mr. Schakne also learned that William Medico, General Manager of Medico Industries, had been identified by both the federal Bureau of Narcotics and the Pennsylvania Crime Commission as a "criminal associate" of organized crime leader Russel Bufalino. *Ibid.* The Pennsylvania Crime Commission report specifically stated that William Medico had a criminal record which included "arrests for suspicion of murder and assault, and convictions for bootlegging and disorderly conduct." *Ibid.* The report also included Medico Industries in a list of "legitimate businesses dominated by organized crime figures [which] have received a number of lucrative public contracts." *Ibid.*

Because of the great public interest in the investigation of Congressman Flood, and the potential newsworthiness of the relationship between an allegedly corrupt congressman and a business that was reportedly dominated by organized crime but was receiving millions of dollars of federal funds, respondent Schakne sought further information about the principals behind Medico Industries, i.e., various members of the Medico family. *Id.* at 137-137A.¹ In particular, Mr. Schakne sought to verify the allegations concerning the criminal records of the Medicos. *Id.* at 137A.

¹ Citations to page "137A" and, *infra*, to page "243A" are to the unnumbered pages following pages 137 and 243, respectively.

On February 3, 1978, following the rejection of an oral request for information about the Medicos' criminal records, Mr. Schakne submitted a Freedom of Information Act ("FOIA") request to the Department of Justice, seeking information about any sentences, convictions, indictments, or arrests involving William, Phillip, Charles, or Samuel Medico. *Id.* at 137A, 179. The Department of Justice initially refused to provide any of the requested information. *Id.* at 138, 180, 183. Mr. Schakne appealed, and the Department of Justice agreed to disclose the criminal identification record (i.e., "rap sheet") of William Medico, who was deceased, but otherwise affirmed the denial of Mr. Schakne's request, *id.* at 138-39, 185-87.

On September 21, 1978, The Reporters Committee for Freedom of the Press filed a FOIA request with the Department of Justice for information about any arrest, indictment, acquittal, conviction, or sentence of William, Phillip, Charles, or Samuel Médico. *Id.* at 139, 188. On October 30, 1978, the Department responded that insufficient information had been provided to permit an accurate search for records pertaining to William Medico, and it denied the request for criminal-record information concerning the other Medicos. *Id.* at 139-40, 190-91. That denial was affirmed following an administrative appeal. *Id.* at 140, 192-193.

On March 13, 1979, in response to inquiries from CBS News seeking clarification of the Department's position, Attorney General Griffin Bell stated that after "a thorough review" of the Department's "policy and practice" it was "unanimously concluded that . . . we are prohibited by statute and case law from releasing certain records which may be contained in

the F.B.I.'s identification files, commonly known as "rap sheets." *Id.* at 140, 194. Attorney General Bell further stated that criminal history information contained in documents other than rap sheets might be disclosed "if not otherwise exempt." *Id.* at 140-41, 194. The Attorney General went on to explain that the Department's release of William Medico's rap sheet had stemmed from a lack of clarity concerning the Department's position on the release of rap sheets. *Id.* at 141, 196.

Respondents filed suit under FOIA in December 1979. The complaint only sought the disclosure of "matters of public record" that were responsive to the FOIA requests. *Id.* at 9. On April 29, 1983, the government informed the district court of its decision to release all criminal-record information concerning Phillip and Samuel Medico, explaining that they had recently died and that disclosure was intended to be "consistent" with the earlier release of criminal information concerning William Medico, also deceased. *Id.* at 243-243A. The government also belatedly conceded that it now recognized the public interest warranting disclosure of certain public-record information regarding Charles Medico—namely, "financial crime" information located in documents other than rap sheets. *Id.* at 243A. However, a search of Department records other than rap sheets had turned up no "financial crime" information concerning Charles Medico. *Id.* at 244. The government continued to withhold any rap-sheet information that it might have for Charles Medico or any "non-financial crime" information concerning him. *Ibid.*

In the district court and the court of appeals, the government contended that 28 U.S.C. § 534 (1982)

restricts disclosure of rap sheets and that they are therefore exempt from disclosure under Exemption 3, 5 U.S.C. § 552(b)(3) (1982). As to both rap sheets and other records, the government also invoked Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C) (1982 & Supp. IV). In this Court, the government has abandoned its reliance on Exemption 3 and is relying solely on Exemptions 6 and 7(C). Petition at 6 n.1.

REASONS FOR DENYING THE WRIT

The court of appeals' decision ordering the release of public-record criminal information does not warrant review by this Court. The court of appeals correctly held that there is only an attenuated privacy interest in information concerning sentences, convictions, acquittals, indictments, or arrests that is freely available to the public. And the court also correctly held that that attenuated privacy interest does not outweigh the public interest in disclosure of information concerning the criminal record of an individual whose company had received defense contracts with the assistance of a congressman under investigation for conflict of interest and corruption.

Respondents agree with the government that a court may appropriately consider the public interest in disclosure of particular information, if for no other reason than to give concrete meaning to the general interests in disclosure underlying FOIA and to facilitate the balancing of the public interest against any substantial privacy interest that may be asserted. To the extent that the court of appeals declined to distinguish among different types of publicly available criminal-record information, its failure

to do so does not warrant review by this Court. The United States Court of Appeals for the District of Columbia Circuit has indicated on several occasions that the public interest in the disclosure of particular documents may be considered. To the extent that the opinion of the panel in this case creates confusion as to the law in the D.C. Circuit, the confusion can be resolved by that Circuit in future cases. This panel's discussion of how to assess the "public interest" did not affect the result in this case, and is unlikely to have the broad impact assumed by the government.

I. The Court of Appeals Correctly Held That There Is Only an Attenuated Privacy Interest in Publicly Available Criminal-Record Information.

The government's petition for certiorari repeatedly mischaracterizes the court of appeals' holding concerning privacy. The court of appeals did not "treat[] all information contained in 'public records' as equally nonprivate," Petition at 14, or equate privacy with "official secrecy at every level of government where the information is maintained," *id.* at 19. The court simply held that there is only "a low-level privacy interest in *criminal records*" which are "*a matter of public record*." App. 19a, 20a (emphasis added). This result is correct and does not warrant review by this Court.

There is nothing novel about the proposition that there can be little, if any, privacy interest in arrests, indictments, convictions, and other formal actions that occur in the course of a criminal prosecution. This Court itself has recognized that an individual has no significant privacy interest as to these matters. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court squarely rejected Davis's claim that the dis-

closure of his arrest on shoplifting charges invaded his privacy: "His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest." *Id.* at 713. Numerous other decisions have also recognized that a person has at most a minimal privacy interest with respect to information about his criminal record. *See, e.g., Hammons v. Scott*, 423 F. Supp. 625, 628 (N.D. Cal. 1976); *Roshto v. Hebert*, 439 So.2d 428, 432 (La. 1983); *Montesano v. Donrey Media Group*, 99 Nev. 644, 668 P.2d 1081, 1084-86 (1983); *Shifflet v. Thomson Newspapers*, 69 Ohio St. 2d 179, 431 N.E.2d 1014, 1018 (1982) (*per curiam*); *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737, 741-42 (Okla. 1980).

By its very nature, information concerning criminal conduct and the administration of justice is public, not private. "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public . . ." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). A criminal charge or conviction is not a private matter involving only the defendant; it is a matter in which the entire community has a substantial interest.

Precisely because of the inherently public nature of, and strong public interest in, criminal prosecutions, records of the formal steps in a criminal prosecution are freely available to the public in nearly all jurisdictions. According to the amicus curiae brief submitted by Search Group, Inc. in support of the

government's suggestion of rehearing en banc, "in virtually every state, records describing a specific arrest are available to the public from the law enforcement agency that made the arrest," and "[i]n virtually every state, records of court judicial proceedings are available from the court as a matter of public record." Brief for Search Group, Inc. *et al.* at 5-6 (citations omitted). The public availability of such records is so well established that, to a large extent, access to such records has been held to be a matter of right, under both the common law and the First Amendment. The courts have long recognized a common-law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted); *see, e.g., In re Sackett*, 136 F.2d 248 (1943); *Ex parte Drawbaugh*, 2 App. D.C. 404 (1894). And recognizing the strong public interest in criminal prosecutions, this Court has held that the First Amendment creates a public right of access to criminal proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Even when legitimate concerns of witnesses or jurors are involved, the public may be excluded from criminal proceedings only upon a specific finding of a compelling interest that cannot be adequately protected in some other way. *See Press-Enterprise Co.*, 464 U.S. at 511-12; *Globe Newspaper Co.*, 457 U.S. at 606-07. Given these protections and the long tradition of public trials, it is inconceivable that the outcome of a trial—whether a conviction or an acquittal—can be considered a private matter.

The widespread availability of criminal-record information undermines any suggestion that such information is, as a general matter, private. In this case, of course, respondents expressly limited their request to criminal-record information that is in fact a matter of public record. If there is any privacy interest at all in such information, it is certainly attenuated. As this Court explained in *Cox Broadcasting*, "official records and documents open to the public are the basic data of governmental operations," 420 U.S. at 492, and "*the interests in privacy fade when the information involved already appears on the public record*," *id.* at 494-95 (emphasis added).

The court of appeals' holding—that there is in general no substantial privacy interest in publicly available criminal-record information—is unassailable. The court of appeals would have been justified in holding that there is no substantial privacy interest in *any* criminal-record information. The court carefully limited its holding, however, to information that is *publicly available* in the jurisdiction in which the conviction or other official act occurred. App. 41a-42a. If a jurisdiction does not make certain criminal-record information freely available to the public, a substantial interest in privacy may still exist as to that information. Moreover, the government's assertion to the contrary notwithstanding, Petition at 15, the court made it clear that the test is *not* whether particular information "happen[s] to be" publicly available:

If a local law enforcement official provides criminal information episodically, or to only certain requesters, that, in our view, would be inadequate.

quate to cause the privacy interest in those criminal records to fade significantly.

App. 20a. What is controlling is not happenstance but the “*practices*” of the jurisdiction in question. App. 42a (emphasis added). If criminal records that were publicly available are expunged, “they can no longer be regarded as public.” App. 20a. Finally, the court’s decision has no application at all to records relating to confidential investigations. App. 18a.²

The government’s reliance on footnote 5 of this Court’s opinion in *United States Dep’t of State v. Washington Post Co.*, 456 U.S. 595 (1982), is misplaced. Petition at 14-16. There the Court indicated that an interest in privacy is not necessarily vitiated by the fact that information “is a matter of public record somewhere in the Nation.” 456 U.S. at 603 n.5. Many private matters may find their way into some record available to the public; *Washington Post Co.* merely recognizes that the appearance of information in a publicly available document does not necessarily mean that any interest in privacy is lost. The

² Under Department of Justice regulations, the Department currently collects criminal record information only on “serious and/or significant offenses,” 28 C.F.R. § 20.32(a) (1987), and does not collect information on offenses committed by juveniles unless they were tried as adults, *id.* § 20.32(b). Although retention of information collected before the regulations became effective is permitted, *id.* § 20.32(c), these restrictions assure that information about minor crimes and crimes committed during a person’s youth ordinarily will not be collected by the Department. Juvenile matters are unlikely to be affected by the court of appeals’ decision in any event, because they are generally treated confidentially.

Court was careful to note, however, that “[t]he public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a ‘clearly unwarranted invasion of personal privacy,’” *Ibid.* Here, the court of appeals confined its holding to information that (1) is regularly made available to the public, App. 42a, and (2) concerns official acts occurring in the course of a criminal prosecution. This conclusion in no way conflicts with *Washington Post Co.*

Indeed, the court of appeals went out of its way to indicate that the information might be exempt if a showing were made similar to the claim asserted in *Washington Post Co.*—that disclosure of the American citizenship of two “prominent figures in Iran’s Revolutionary Government” would invade their privacy by subjecting them to “‘a real threat of physical harm.’” 456 U.S. at 597. The court of appeals made it clear that the information sought might be exempt if there were reason to believe disclosure would cause harm:

For instance, had it been shown to us that disclosure of Medico’s “rap sheet” would cause him particular harm, even though his privacy interest is slight, we might well have reached a different conclusion.

App. 40. The court’s analysis was thus fully consistent with *Washington Post Co.*

The Court can quickly dispense with the assertion, Petition at 14, that the decision below conflicts with the Second Circuit’s decision in *Rose v. Dep’t of the Air Force*, 495 F.2d 261 (2d Cir. 1974), *aff’d*, 425 U.S. 352 (1976). *Rose* did not concern either crim-

inal records or any other type of publicly available information; it involved summaries of honor and ethics hearings held at a military academy. Whereas the ruling here applies to information which is inherently of public concern and is freely accessible to the general public, the information in *Rose* related solely to possible ethical transgressions of students at the academy, was available only within the military academy, and even then was in some cases redacted to protect the identity of the student. 495 F.2d at 266.³

The government makes a great deal of the “widespread concern that privacy is, as a practical matter, threatened by the availability of compiled information in large, centralized government data banks.” Petition at 18. But whatever concerns government data banks may raise as a general matter, the existence of such data banks cannot and does not transform the fundamentally public information at issue here—publicly available criminal-record information—

³ These striking differences dispose of the government’s charge that the court of appeals “ignor[ed] [an] important element of personal privacy”—namely, that “persons with prior access to the information may not have realized its significance or may have forgotten what they once knew.” Petition at 14 (citation omitted). It is one thing to recognize that these factors help explain why there can be a legitimate expectation of privacy where, as in *Rose*, information has been disclosed only to a select group for a limited purpose. It would be quite another thing to hold that there can be a legitimate expectation of privacy as to *publicly available* information concerning criminal conduct and the administration of justice. An individual’s interest in maintaining difficulty of access to publicly available documents reflecting his criminal record cannot be equated with a legitimate interest in privacy.

into private information. A public fact such as a conviction is not transformed into a private fact when it is included in a government data bank.

The proper means of addressing concerns about government data banks is executive action limiting the gathering or retention of information thought to pose a threat to privacy, or legislation limiting access to particular types of information. As the court of appeals noted, Congress has considered the possibility of limiting access to federal compilations of public criminal records, App. 23a n.15, 42a, but “has chosen not to pass a statute that would establish the federal policy that [petitioners] now urge us to announce without a legislative mandate,” App. 42a. Since the government has abandoned the contention, vigorously advanced below, that 28 U.S.C. § 534 prohibits disclosure of rap sheets, it is undisputed in this Court that no federal statute prohibits disclosure of criminal records. The concept of privacy under FOIA should not be distorted so as to serve as a surrogate for separate legislation that the Department of Justice believes Congress should enact.⁴

⁴ The government’s claim that the court of appeals’ ruling will impose enormous administrative burdens on federal agencies cannot withstand scrutiny. Petition at 19-20. First, the government has made no showing that agencies receive a substantial volume of requests for criminal-record information. Second, an agency is not obligated to determine the practices of the source jurisdiction before deciding whether to release the information. FOIA exemptions are discretionary, not mandatory. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). Whether to determine the practices of the source jurisdiction, on the small chance that the jurisdiction may restrict access to the information, is for the government to decide in the exercise of its discretion. Given that criminal-record information is apparently freely accessible to the public

II. Certiorari Should Not Be Granted To Clarify the Law of the District of Columbia Circuit Concerning the "Public Interest" Side of the Balancing Test.

This Court should also reject the government's invitation, Petition at 22-29, to grant certiorari to review the court of appeals' discussion of the "public interest" side of the balancing performed under Exemptions 6 and 7(C). The court of appeals emphasized that the Medicos reportedly had had dealings with government officials, App. 38a, but declined to create a hierarchy distinguishing among different types of criminal-record information, App. 38a-40a. The court indicated that the focus should be on "the general disclosure policies of the statute," App. 39a (footnote omitted), and concluded that those policies require disclosure of publicly available criminal-record information concerning Charles Medico. App. 26a, 42a.

These statements do not warrant review by this Court. Prior to the decision below, the District of Columbia Circuit had repeatedly considered the public interest in the particular information at issue in balancing the privacy interest at stake against the public interest in disclosure under Exemptions 6 and 7(C). See, e.g., *Carter v. United States Dep't of Commerce*, 830 F.2d 388, 391 n.13, 394 & n.20 (D.C. Cir. 1987); *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987);

in nearly every state, see pp. 7-8, *supra*, it would not be unreasonable for the Department of Justice to inform state law enforcement agencies supplying criminal-record information that such information will be subject to disclosure under FOIA unless the agency notifies the Department that it restricts access to the information.

Stern v. FBI, 737 F.2d 84, 92 (D.C. Cir. 1984); *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 866 (D.C. Cir. 1981); *Baez v. United States Dep't of Justice*, 647 F.2d 1328, 1338-39 (D.C. Cir. 1980); *Rural Housing Alliance v. United States Dep't of Agric.*, 498 F.2d 73, 77-78 (D.C. Cir. 1974); *Getman v. N.L.R.B.*, 450 F.2d 670, 675-77 (D.C. Cir. 1971). Although the panel below declined to distinguish among different types of criminal-record information, the panel's general statements concerning assessment of the "public interest" are unlikely to supplant this long line of decisions and preclude any inquiry into the interest in disclosure of the particular information sought.⁵ Indeed, in *Washington Post Co. v. United States Dep't of State*, No. 84-5604 (D.C. Cir. Feb. 5, 1988), which was decided *after* the decision below and which the government itself cites, the court remanded the case for a "balancing," following discovery and an evidentiary hearing, of "the disclosure and the privacy interests staked out *in this case*." Slip op. at 21 (emphasis added). It is thus already apparent⁶ that the panel decision in this case is unlikely to have the sweeping effect ascribed to it by the government.⁷

⁵ Under settled precedent in the District of Columbia Circuit, one panel cannot overrule another; a panel decision can be overruled only by the full court sitting en banc. See, e.g., *Henderson v. Milobsky*, 595 F.2d 654, 657 n.14 (D.C. Cir. 1978).

⁶ In an attempt to build up the importance of the court of appeals' abstract discussion of the "public interest" issue, the government asserts that the court's decision may "engender confusion." Petition at 12 n.4. The government states that in *United States Dep't of the Air Force v. FLRA*, No. 87-1143 (7th Cir. Jan. 27, 1988), the Seventh Circuit

It is obviously impossible to predict precisely how later panels in the District of Columbia Circuit will attempt to reconcile the statements in the opinion below with the long line of decisions in the Circuit focusing on the interest in disclosure of the specific information sought. However, we suspect that the opinion here will have little, if any, influence beyond the factual situation that the court specifically addressed: criminal-record information freely accessible to the public. As applied to those facts (the only concrete set of facts before the court), the refusal to create a hierarchy distinguishing different types of crime is entirely defensible.

The court was dealing with information which it had already recognized posed little threat to privacy, and was responding to the government's contention that the public interest in disclosure was minimal—even though Medico Industries was, according to the Pennsylvania Crime Commission, "dominated by organized crime figures," and had been awarded lucra-

"agree[d] with the court below that courts may not inquire into the public interest favoring disclosure of particular information." Petition at 12 n.4. In fact, however, the Seventh Circuit embraced the traditional approach to balancing the public interest in disclosure against the privacy interest at stake, while clarifying that the particular purpose of the requester is not important: "The balancing . . . must be conducted at a more general level. Do the several uses to which many people would put the information justify its release?" Slip op. at 7. It is surprising that the government would cite this opinion as evidence that the court of appeals' decision will create "confusion," since the government itself states that "we agree with the court's view that the Exemption 6 or Exemption 7(C) balance does not vary from case to case depending on the identity of the requester." Petition at 21 n.14.

tive defense contracts with the help of a congressman under investigation for conflict of interest and corruption at the time of the FOIA requests. Given the minimal privacy interest at stake, the substantial federal funding, and the investigation of Congressman Flood, the court was surely correct in ruling that no special showing of importance was necessary to justify disclosure. Under the circumstances, the public interest in any information concerning Charles Medico's criminal record outweighs whatever minimal privacy interest may be at stake.

If the public interest in disclosure in this case is judged in terms of the "basic purposes" that the government ascribes to FOIA, Petition at 27, respondents' requests easily satisfy the standard for disclosure. As the court of appeals noted, "[t]he subjects of [respondents'] requests are alleged to have had dealings with government officials . . ." App. 38a. Moreover, the dealings were significant, and the type of information sought is pertinent to the subjects' fitness to receive government contracts. Respondents' requests are thus fully compatible with the "basic purpose" of FOIA—"to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

In the district court, the government conceded that any interest in privacy was outweighed by the public interest in disclosure of "financial crime" information, but arbitrarily refused to disclose information about any other crimes. Given the facts of this case,

the court of appeals properly rejected the government's contention that "non-financial crime" information is exempt from disclosure. Any crime would be relevant to Charles Medico's fitness to carry out a federal contract, and many "non-financial" crimes (such as perjury or making false statements to a government agency) would be just as important as "financial" crimes.

Any tension between the opinion below and other opinions in the District of Columbia Circuit is not one that merits the attention of this Court. See *Davis v. United States*, 417 U.S. 333, 340 (1970); *Wisniewski v. United States*, 353 U.S. 901 (1957) (*per curiam*). That tension is likely to be resolved in a satisfactory fashion without this Court's intervention; in the unlikely event it is not satisfactorily resolved, there will be time enough for the Court to become involved.

Finally, if it ever becomes necessary for this Court to resolve the "public interest" issue raised by the government, the Court should do so in a case in which it would receive an adversary presentation on the issue. Here, respondents agree with the government that the public interest in particular information may be considered, if for no other reason than to illustrate the general interests in disclosure underlying FOIA and to facilitate the required balancing of interests. The fact that the parties do not appear to disagree on how to approach the "public interest" question is an additional consideration making this case an unworthy candidate for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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In the Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONERS

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Exemptions 6 and 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), have been generally understood to call for a judicial balancing of the public interest in disclosure of particular records against the privacy interests of the subject of those records. The district judge and the dissenting panel member in the court of appeals both concluded that the privacy interests of Charles Medico outweigh any public interest in disclosure (Pet. App. 57a, 59a (district court); *id.* at 49a (Starr, J., dissenting)).¹ The court of appeals

¹ The district judge reviewed our in camera submission of any records at issue and adhered to this conclusion (Pet. App. 59a). Although the court of appeals was less explicit about whether it performed such a review, it appears that the members of the panel examined our in camera submission (see Pet. 10 n.3) – although the majority regarded the content of that submission as essentially irrelevant to the issues before it.

majority reversed, expressly adopting approaches to both the “privacy” and “public interest” components of the balance that are important departures from settled law (see *id.* at 23a, 26a, 38a (criticizing district court and dissent for purporting to be able to conduct the conventional balancing)). In major part, even respondents decline to defend the approach taken by the majority (see Br. in Opp. 5-6, 18). Instead, they claim that the errors in the analysis below “did not affect the result in this case” (*id.* at 6) and are unlikely to be repeated. But they do not succeed in obscuring the major importance of this case.

1. Respondents suggest that this is not an appropriate case to consider the court of appeals’ broad rulings on the meaning of “privacy” and “public interest” because (they say) on the facts of this case an order compelling disclosure is unassailable. Like the two judges who *did* consider the specific facts of this case, we disagree.

Respondents claim the right to all records of *arrests* of Charles Medico, no matter how old, no matter what the charge, and no matter whether any prosecution ensued,² so long as the records would be publicly available somewhere to a person who knew where and how to ask for them. The government does not categorically deny respondents’ right to arrest records. For example, we recognize that, in light of Charles Medico’s connection to Representative Flood, there could well be a legitimate public interest, outweighing any privacy interest, in *some* kinds of crimes for which Medico might have been arrested, especially if prosecution ensued.³ We have,

² Respondents’ assertion (Br. in Opp. 11) that the court of appeals “confined its holding to information that * * * concerns official acts occurring in the course of a criminal prosecution” is simply wrong.

³ Contrary to respondents’ implication, we have never withheld financial crime information, nor did we “belatedly * * * recognize[] the public interest warranting disclosure of * * * ‘financial crime’ in-

however, contended that the contents of any records that actually exist are so unrelated to any public business that any public interest in them is outweighed by a private citizen’s “cherish[ed] * * * notion that our past mistakes will be forgotten, and * * * distaste for the widespread publication of such information as arrest records” (Pet. App. 19a).⁴ We have submitted any actual records to the district court to make that weighing, and it did so and ruled in our favor. The issue in this case is whether it should have engaged in the weighing process at all.

formation” (Br. in Opp. 4). As soon as respondents made specific reference to “a record of bribery, embezzlement or other financial crime” (C.A. App. 137A; see also *id.* at 321 n.1), we stated that we were *not* withholding any such information. We had no earlier occasion to make such a statement. Nor did we argue below that the public cannot have any legitimate interest in any information other than “financial crime” information. We have had no occasion to join issue on whether “many ‘non-financial’ crimes (such as perjury or making false statements to a government agency) would be just as important as ‘financial’ crimes” (Br. in Opp. 18), because respondents never mentioned perjury or false-statement offenses in the lower courts. Any actual withheld records were available to the courts below (as they are to this Court). It is nondisclosure of those actual records—not any “arbitrar[y] refus[al] to disclose information about *any* other crimes” than financial ones (*id.* at 17 (emphasis added))—that the judges who conducted a conventional balancing were willing to uphold (Pet. App. 49a, 57a, 59a).

⁴ A hypothetical example based on the record of this case can be used to illustrate the point. The “rap sheet” of William Medico, who is deceased, shows that he was arrested in Scranton, Pennsylvania, on or about February 3, 1931, for an alleged violation of the National Prohibition Act but that he was then released (C.A. App. 24). The rap sheet reflects no further action on this charge. If such a charge appeared on the records of Charles Medico, a living person, we do not see how there could be any public interest that justified the invasion of privacy that would result from releasing this arrest record to “any person” (5 U.S.C. 552(a)(3)), even if this 57-year-old arrest record was publicly available at its source.

2. Respondents do seek to defend the court of appeals' notion that there virtually cannot be more than a negligible privacy interest in a "public record." Respondents' defense rests, however, on misreading decisions of this Court and on other errors.

a. Respondents assert that in *Paul v. Davis*, 424 U.S. 693 (1976), this Court "squarely rejected Davis's claim that the disclosure of his arrest on shoplifting charges invaded his privacy" (Br. in Opp. 6-7). This assertion is a mere play on words. What the Court held in *Davis* was that Davis had no *constitutional* privacy right that *forbade* disclosure of his arrest (424 U.S. at 713). No one is claiming that Charles Medico has any such constitutional right. We contend only that he has a privacy interest that should be given appropriate weight under a statute that calls on courts to determine when disclosure is "unwarranted" (5 U.S.C. (Supp. IV) 552(b)(7)(C)).

b. In *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 603 n.5 (1982), this Court said that "the fact that citizenship is a matter of public record somewhere in the Nation cannot be decisive" of the privacy interest of the individual. The Court's statement was a response to an argument, vigorously made,⁵ that FOIA necessarily compelled disclosure of a foreign-born person's United States citizenship status, because under 8 U.S.C. 1447 and 1448 that person, if a citizen, would have been naturalized "in open court," so there could be nothing "private" about citizenship. Respondents now

⁵ See Brief in Opposition at 2-5, *United States Dep't of State v. Washington Post Co.*, *supra*; Brief for the Respondent at 24-31, *United States Dep't of State v. Washington Post Co.*, *supra*; Brief Amici Curiae of the American Newspaper Publishers Association, et al., at 5-6, 9-10, *United States Dep't of State v. Washington Post Co.*, *supra*. Respondent Reporters Committee joined the amicus brief in the *Washington Post* case.

suggest (Br. in Opp. 10) that the Court's statement applies only to records other than judicial or quasi-judicial records, but the facts of *Washington Post* belie that suggestion. In fact, the Court's footnote identified "past criminal convictions" as one sort of information subject to a balancing test despite being a matter of public record (456 U.S. at 603 n.5).⁶

The clear lesson of *Washington Post* is that being a "matter of public record" is but one factor bearing on an inquiry to be made "under all the circumstances of a given case" (456 U.S. at 603 n.5). The fact that "the information is difficult to locate" is one of the circumstances deserving consideration. *Washington Post Co. v. United States Dep't of State*, 647 F.2d 197, 200 (D.C. Cir. 1981) (Lumbard, J., concurring), rev'd, 456 U.S. 595 (1982). Other circumstances that deserve consideration include the age and nature of any arrest, charge, or offense and the unique privacy implications of the release of "cumulative, indexed, computerized information" (Pet. App. 48a (Starr, J., dissenting)). The position of respondents that there is necessarily "only 'a low-level privacy interest in *criminal records*' which are '*a matter of public record*'" (Br. in Opp. 6 (quoting Pet. App. 19a, 20a) (emphasis added by respondents)) misconceives *Washington Post*.

c. This is not a case about access to court proceedings, access to court records, or publication of court records once obtained (see Br. in Opp. 7-9; cf. Pet. 19 n.9). As far as we know, respondents were not and did not seek to be present at any court proceedings involving Charles Medico and have not gone to the original source for any of the

⁶ Moreover, the analysis of the court of appeals in this case does not purport to be limited to judicial or quasi-judicial records. See Pet. App. 48a (Starr, J., dissenting); *id.* at 66a (Bork, Starr, Buckley & Sentelle, JJ., dissenting).

information they seek. Nor has the federal government sought to prevent them from publishing any information that they have obtained.

This case is about the important question whether the federal government will be made into an *additional* – centralized – source for otherwise obscure arrest records and court records, on the theory that despite their obscurity there is no nonnegligible privacy interest in them because they are available somewhere. As the amicus brief filed by the States of California and New York demonstrates, one can rationally find it acceptable to invade a person's privacy to the extent of keeping his arrest or court records available at their original source, but not to invade his privacy to the much greater extent of making many such records, compiled in one central location, available to "any person" (5 U.S.C. 552(a)(3)) on demand. As amici further demonstrate, the distinction between raw data and compiled data is not adequately answered by the blithe suggestion (Br. in Opp. 13) that the data should not be compiled by the government in the first place. Information sharing by local, state, and federal law enforcement authorities is meant to aid enforcement of the laws, a goal that neither supports release of information to the general public nor becomes illegitimate just because of a refusal to release compiled information to the general public.⁷

⁷ Respondents' assertion that we are seeking to "distort[]" the concept of privacy "as a surrogate for separate legislation" (Br. in Opp. 13) is far off the mark. Regardless of whether privacy concerns may prompt further legislative protections against disclosure of criminal records, such concerns have already prompted Congress to provide the broader protections of Exemptions 6 and 7(C) of FOIA, to be applied by judicial balancing in a wide variety of contexts. It is the court of appeals, in its artificial narrowing of the concept of privacy under these exemptions (Pet. App. 16a-19a), that has attempted judicial legislation.

d. Respondents contend that the court of appeals' privacy analysis is confined by that court's definition of "public record" (Br. in Opp. 9-10) and its disclaimer that its result might be different if there were a particularized showing of harm (*id.* at 11). Neither statement imposes a workable limitation, and neither is based on FOIA.

The court's redefinition of the phrase "public record" (Pet. App. 20a, 42a) to require an understanding of the practices of the originating jurisdiction would impose on the federal government a serious burden that is not justified by the statute that the court purported to interpret. As Justice Brennan has observed, "FOIA [does not] compel[] the Government to conduct research on behalf of private citizens." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 159-160 n.2 (1980) (Brennan, J., concurring in part and dissenting in part); see also *id.* at 152 (opinion of the Court). The court of appeals' definition of "public record," which certainly cannot be found in FOIA or its legislative history, would apparently require agencies both to examine and to evaluate the practices of other governments before the court will uphold the nondisclosure of any arrest record. This aspect of the opinion below is not a saving grace but a serious distortion of the law (see Pet. 19-21 & n.10).

Equally unhelpful and incorrect is the court's demand (Pet. App. 40a) that particularized harm be shown before federal release of a "public record" will be deemed to invade privacy any more than slightly. First, this analysis is directly contrary to the words of the statute, which exempt from mandatory disclosure those law enforcement records whose disclosure "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C) (emphasis added)). Second, this analysis is contrary to common sense. No person wants his arrest record disseminated to any and all

persons who ask the federal government for it. There is no warrant to deride that desire, which is an aspect of privacy, as insignificant in the absence of more particularized showings of harm. See *Miller v. Bell*, 611 F.2d 623, 629 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); see also *Plain Dealer Pub. Co. v. United States Dep't of Labor*, 471 F. Supp. 1023, 1028 (D.D.C. 1979).

3. As to the "public interest" side of the balancing test, respondents have conceded (Br. in Opp. 5-6, 18) that the court of appeals erred in ruling that there is no way, or need, to weigh the public interest in disclosure of particular documents, and we have already responded to their assertion that the error makes no difference to the outcome of this case. We do, of course, dispute respondents' wholly inaccurate characterization of this case as one in which we seek only clarification of the law of the District of Columbia Circuit (*id.* at 14, 16). The decision below conflicts not only with cases from that court of appeals, which the panel repudiated (Pet. App. 37a & n.1) and the en banc court did not revive (see *id.* at 64a-66a), but also with cases from at least seven other circuits (see Pet. 23 n.13), a fact that respondents ignore.

In addition, we dispute respondents' contention (Br. in Opp. 16) that this decision is likely to be limited to cases involving criminal records, a limitation the panel certainly did not intend (see Pet. App. 37a-40a (citing many cases not involving criminal records)).⁹ Indeed, the Third,

⁹ *Washington Post Co. v. United States Dep't of State*, No. 84-5604 (D.C. Cir. Feb. 5, 1988), which respondents discuss (Br. in Opp. 15), does nothing to support their contention that the decision in this case will be so constrained. The *Washington Post* court engaged in no substantive discussion whatever of the "public interest" part of the balancing test; its discussion concerned the interests on the other side (see slip op. 8).

Seventh, and Eighth Circuits have already considered the applicability of this part of this decision to other kinds of records, and, although only the Seventh Circuit has followed it rather than distinguished it, no court has distinguished it on the ground that it is limited to criminal records. See *United States Dep't of Navy v. FLRA*, No. 87-3005 (3d Cir. Mar. 2, 1988), slip op. 12 n.2; *United States Dep't of Air Force v. FLRA*, 838 F.2d 229, 233 (7th Cir. 1988); *United States Dep't of Agriculture v. FLRA*, 836 F.2d 1139, 1143 n.3 (8th Cir. 1988).⁹

Furthermore, unless and until this decision is reviewed and overturned, federal agencies must assume that it means what it says and must take account of the fact that their FOIA determinations may be reviewed (as all FOIA decisions may be under 5 U.S.C. 552(a)(4)(B)) in the United States District Court for the District of Columbia, where this decision is binding precedent. Thus, even respondents' view of this case as one involving only an error in the application of the law of the District of Columbia Circuit is not a persuasive basis for denying review.

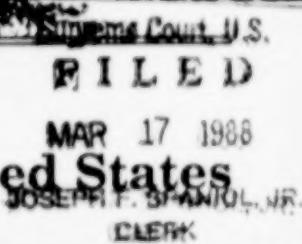
⁹ We do not understand how respondents can read the Seventh Circuit's decision as standing only for the narrow (and correct) proposition that the identity of the requester is irrelevant to the "public interest" that is to be considered under FOIA (Br. in Opp. 15-16 n.6). The court stated: "We agree with *Reporters Committee* ***; 'We do not believe that the phrase "public interest" as used in the balancing in Exemptions 6 and 7(C) of the Act, means anything more or less than the general disclosure policies of the statute. *** [W]e do not believe Congress intended the federal judiciary *** to construct its own hierarchy of the public interest in disclosure of *particular information*.' " 838 F.2d at 233 (emphasis added).

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

APRIL 1988

In The
Supreme Court of the United States
 October Term, 1987



UNITED STATES
 DEPARTMENT OF JUSTICE, ET AL.,

vs. *Petitioners,*

REPORTERS COMMITTEE FOR FREEDOM
 OF THE PRESS, ET AL.

Respondents.

**Petition For A Writ Of Certiorari To The United
 States Court Of Appeals For The District Of
 Columbia Circuit**

**AMICI CURIAE BRIEF OF THE STATES OF
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 IN SUPPORT OF PETITION
 FOR A WRIT OF CERTIORARI**

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INTEREST OF AMICI CURIAE

The State of California, by its Attorney General, John K. Van De Kamp, and the State of New York, by its Attorney General, Robert Abrams, respectfully submit this brief as amici curiae pursuant to Supreme Court Rule 36.4.

The Court of Appeals in this case has ruled that the Freedom of Information Act requires the Department of Justice to disclose criminal history information provided by the states and local governments to the Federal Bureau of Investigation.

Amici voluntarily provide criminal history information to the Federal Bureau of Investigation with the understanding that this information will remain confidential and be used for law enforcement purposes only.

The Attorney General of California is responsible for the security of criminal offender information and is specifically charged with guarding against unauthorized disclosures of information and insuring that this information is disseminated only on a need-to-know basis. He is additionally responsible for the coordination of the interstate exchange of criminal offender record information. (Cal. Penal Code § 11077.)

Additionally, California case law and Article 1, section 1 of the California Constitution recognize the right to privacy as an inalienable right of the individual. See *White v. Davis*, 13 Cal.3d 757, 773-75 (1975). The California courts have found the official retention and dissemination of criminal history information to be an incursion into the right of privacy but they have tolerated this incursion on the ground that it is justified by

a compelling state interest in law enforcement. *Loder v. Municipal Court*, 17 Cal.3d 859, 864-868 (1976); *Central Valley Chap. 7th Step Foundation v. Younger*, 95 Cal.App.3d 212, 236 (1979).

The Division of Criminal Justice Services of the State of New York is responsible for operating New York's criminal history record repository. As part of this responsibility, the Division of Criminal Justice Services is charged with, among other things, ensuring that only "qualified agencies" have access to information held by New York's criminal history repository. N.Y. Executive Law § 837(6) (McKinney 1982). Subdivision 8 of that law imposes on the Division of Criminal Justice Services a duty to "[a]dopt appropriate measures to assure the security and privacy of identification and information data." The Division of Criminal Justice Services is statutorily empowered to disclose criminal history record information only to those agencies or persons authorized by law. The decision of the Circuit Court of Appeals threatens not only the individual privacy rights of individual Californians and New Yorkers but also threatens to undermine the California and the New York courts' tolerance of this limited incursion into the individual's sphere of privacy.

ARGUMENT

I

THE COURT OF APPEALS CONCEPTION OF PRIVACY IS UNDULY RESTRICTIVE AND REPRESENTS A SIGNIFICANT RETREAT FROM MODERN NOTIONS OF PERSONAL PRIVACY.

In its attempts to articulate a rationale for decision, the Court of Appeals twice grappled, each time unsuccessfully, with the exemptions from disclosure that the Freedom of Information Act grants generally to files whose disclosure would constitute a "clearly unwarranted invasion of privacy" (5 U.S.C. § 552(a)(B)(6)) and specifically to law enforcement records or information disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." (5 U.S.C. § 552(a)(B)(7)(C).)

In its first opinion the court decided "private personal information" was information that was "not yet in the public domain." *U.S. Dept. of Justice et al. v. Reporters Committee for Freedom of the Press et al. v. U.S. Department of Justice*, 816 F.2d 730, 738 (DC Cir. 1987).

In its denial of rehearing, the Court of Appeals did not disavow its earlier definition of privacy but stated that the district court had to determine as a question of fact:

... Has a legitimate privacy interest of the subject in his rap sheets faded because they appear on the public record? ... as a matter of fact, not law ... by reason of actual practices of the jurisdiction that is

the original source [has] the subjects privacy interest faded. *Reporters Comm. etc. v. U.S. Dept. of Justice*, 831 F.2d 1124, 1127 (1987).

In California and New York the courts have long recognized that personal privacy interests include protecting individuals from the encroachment of computer technology and government data collection activities which make "cradle-to-grave profiles" of citizens possible. *White v. Davis*, 13 Cal.3d 757, 775 (1975); *Mtr. of Legal Aid Soc. v. Mallon*, 76 Misc. 2d 455 (Sup. Ct. 1973), modified on other grounds, 47 A.D.2d 646 (2d Dept. 1975). Concern with the protection of the privacy rights of individuals includes placing appropriate restraints on the information gathering and disseminating activities of government to prevent information legitimately gathered for one purpose from being misused for other purposes or wrongfully disseminated. 13 Cal.3d at 775.

While criminal history information is theoretically in the public domain because somehow, somewhere it could be located, California recognizes a privacy interest in the "compiled criminal history information." It is the act of creating files on citizens and compiling information about them that impinges on the right of privacy.

Controlling the collection and circulation of "personal information" is a fundamental aspect of the right of privacy. *Ibid.* p. 775. In California, the State Supreme Court and the Court of Appeal have actually held that the compilation of criminal history information about arrests that do not lead to convictions is an incursion into the right of privacy justified only by the

compelling state interests in law enforcement. *Loder v. Municipal Court*, *supra*, 17 Cal.3d 859, 865-868 (1976); *Central Valley Chap. 7th Step Foundation v. Younger*, *supra*, 95 Cal.App.3d 212, 236 (1979).

Similarly, New York regards criminal history information in the state's central repository as exempt from disclosure except for criminal justice and other limited purposes specified by statute. New York views computer compilations as exempt even though the underlying records may be public. The Circuit Court's refusal to consider the distinction between information in public records and compilations of those records threatens the privacy interests of the citizens of both New York and California.

As is the case in the majority of States, court dockets and police arrest records are publicly available in New York. By law, in New York "[a] docket-book, kept by a clerk of a court . . . must be kept open . . . for search and examination by any person." N.Y. Judiciary Law § 255-b (McKinney 1983). Likewise, in New York, the information found in police blotters is a matter of public record. Although there is currently no specific reference to "police blotters" as public records, earlier case law and the predecessor to the present Freedom of Information Law have considered "police blotters" public records. See 1974 N.Y. Laws, c. 578 § 2; *Sheehan v. City of Binghamton*, 59 A.D.2d 808 (3rd Dept. 1977). Despite the fact that these records are publicly available at the local level, New York has distinguished, by law, between the arrest and conviction records garnered from police blotters and court dockets and the criminal history record information found in the State's central repository.

In its examination of the privacy interests involved in this FOIA request, the Circuit Court of Appeals overlooked the distinction between the original records available at their "primary source" and the criminal record information kept in the repositories in the form of indexed, cumulative records of arrests and convictions. The purposes of these original records of entry and the indexed criminal history records are different. The information found in "police blotters" and court dockets is compiled to record arrests, the filing of criminal charges and court dispositions for the purposes of the agency keeping those records. Criminal history records information, on the other hand, is compiled to give criminal justice agencies and courts as complete as possible a history of an individual's criminal career.

Because the records at issue in this case are those in the indexed form, known customarily as criminal history record information or "rap sheets," the states' treatment of these criminal history records is the more appropriate focus of a court's inquiry when examining privacy interests. Pursuant to state law, New York treats the criminal history record information consolidated in the State's central repository as available only for criminal justice purposes unless otherwise authorized by statute or court order.

Federal decisions are consistent with the notion of individual privacy as "protection from unjustifiable government interference with their private lives." *Tarlton v. Saxbe*, 507 F.2d 1116, 1124 (D.C. Cir. 1971); See also, *Utz. v. Cullinane*, 520 F.2d 467 (D.C. Cir. 1975).

One court has aptly noted that:

A heavy burden is placed on all branches of Government to maintain a proper equilibrium between the acquisition of information and the necessity to safeguard privacy. Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in this land. If information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm. *Menard v. Mitchell*, 328 F.Supp. 718, 726 (D.C. Dist. 1971) *rev'd sub nom. Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

The Court of Appeals' decision in this case threatens to upset the delicate equilibrium state and federal laws seek to achieve between the acquisition of personal information for law enforcement purposes and the need to protect individual privacy by regulating the distribution of this information.

The Court of Appeals' notion that there ceases to be a privacy interest in arrest records because at one time the information may have been public is unfounded.

But merely because a fact is one that occurred at a public place and in the view of the general public, which may have been only a few persons or merely because it can be found in a public record, does not mean that it should receive widespread publicity if it does not involve a matter of public concern. There can be such a thing as highly offensive publicity to something that happened long ago even though it occurred in a public place. Wm. Prosser

and R. Keeton, *The Law of Torts* (5 Ed. 1984), p. 859, fn. omitted.

There is an undoubted "social stigma" involved in an arrest record. *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); (fn. omitted). And this Court has long realized that an individual has an interest in his own reputation.¹ Cf. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

The release of criminal history information about individuals in response to a freedom of information act request is clearly an "unwarranted incursion of the modern understanding of the notion of" personal privacy.

The decision of the Court of Appeals is a retreat from the modern understanding that personal privacy includes freedom from the dissemination of personal information collected by the government for law enforcement purposes. Additionally, the decision is unconvincing in its attempts to disavow Congress' clear intent that the Freedom of Information Act not be a vehicle for "the unwarranted invasion of privacy."

1. Not only does an individual have a privacy interest in the release of truthful information about himself, he also has an interest that only accurate information be released. The Federal Bureau of Investigation is simply not in a position to guarantee the accuracy of its records or to resolve disputes over the accuracy of records. *Alexander v. U.S.*, 787 F.2d 1349, 1350 (9th Cir. 1986). The possibility that inaccurate information may be released about individuals is further reason not to allow this information to be released.

Amici respectfully submit that certiorari should be granted to protect the state and federal rights of individuals to privacy.

II

THE DECISION OF THE COURT OF APPEALS THREATENS MANY STATES' VOLUNTARY SHARING OF INFORMATION WITH THE FBI

The Court of Appeals has ruled in essence that any member of the public can obtain criminal history information from the FBI upon a finding that an individual's legitimate privacy interest in maintaining the confidentiality of his criminal history information has faded because the information appears somewhere in the public record (*Reports Comm. etc. v. U.S. Dept. of Justice, supra*, 831 F.2d at 1127). This erroneous holding threatens the continued participation of many states in the NCIC.

States share criminal history information with the FBI on a voluntary mutually beneficial basis. *Menard v. Saxbe, supra*, 498 F.2d at 1021; 28 C.F.R. § 0.85(b). The laws of many states allow the submission of criminal history information to the FBI on a confidential basis with the understanding the information will remain confidential and will be released for law enforcement purposes only.

In California, for example, criminal offender record information is to be disseminated only to agencies who are authorized by statute or law to have access to such

records. (Cal. Pen. Code, §§ 11076; 11081.)² The Attorney General of California is responsible for the security of criminal offender record information and is specifically charged with guarding against unauthorized disclosures of information, insuring the information is disseminated only on a need-to-know basis and with coordinating the interstate exchange of criminal offender record information. (Cal. Pen. Code, § 11077.)³

Agencies holding or keeping criminal offender information are required to maintain records of

2. California Penal Code, section 11076 provides:

"Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute."

California Penal Code, section 11081 provides:

"Nothing in this article shall be construed to authorize access of any person or public agency to individual criminal offender record information unless such access is otherwise authorized by law."

3. California Penal Code, section 11077 provides:

"The Attorney General is responsible for the security of criminal offender record information. To this end, he shall:

"(a) Establish regulations to assure the security of criminal offender record information from unauthorized disclosures at all levels of operation in this state.

"(b) Establish regulations to assure that such information shall be disseminated only in situations in which

(Continued on following page)

agencies to which they have released or communicated information. (Cal. Pen. Code, §11078.)⁴

California Penal Code section 11105 sets forth two categories of agencies and persons authorized by law to receive criminal record information compiled at the state level by the Attorney General. The first category is comprised of agencies and persons to whom the Attorney General is required to furnish this information "*when needed in the course of their duties.*" (Cal. Pen. Code, §11105, subd.(b).) It includes the courts, certain classes of peace officers performing traditional

(Continued from previous page)
it is demonstrably required for the performance of an agency's or official's functions.

"(c) Coordinate such activities with those of any interstate systems for the exchange of criminal offender record information.

"(d) Cause to be initiated for employees of all agencies that maintain, receive, or are eligible to maintain or receive, criminal offender record information a continuing educational program in the proper use and control of criminal offender record information.

"(e) Establish such regulations as he finds appropriate to carry out his functions under this article."

4. California Penal Code, section 11078 provides:

"Each agency holding or receiving criminal offender record information in a computerized system shall maintain, for such period as is found by the Attorney General to be appropriate, a listing of the agencies to which it has released or communicated such information."

law enforcement functions, district attorneys, probation and parole officers, defense attorneys when so authorized, and state or local agencies or officers in strictly limited circumstances.

Release to the second category is permissive. This category is composed of other agencies or officers to whom the Attorney General "may" furnish this information, but he is permitted to do so only "upon a showing of a compelling need." (Cal. Pen. Code §11105, subd.(c).) (See *Loder v. Municipal Court, supra*, 17 Cal.3d at 873.)

Included in the second permissive category, are public officers of the United States authorized by federal statute to receive similar records (Cal. Pen. Code, § 11105(c)(4)) and peace officers of the United States (Cal. Pen. Code, § 11105(c)(7)).

It is a crime to disseminate a criminal history record or information from a criminal history record to an unauthorized person. (Cal. Pen. Code, §§ 11141 and 11142.)⁵ It is also a crime for an unauthorized person to

5. California Penal Code, section 11141 provides:

"Any employee of the Department of Justice who knowingly furnishes a record of information obtained from a record to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor."

California Penal Code, section 11142 provides:

"Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor."

buy, receive or possess a criminal history record or information from a criminal history record. (Cal. Pen. Code, § 11143.)⁶

Finally, a statutory civil penalty is provided in all cases where criminal record information is unlawfully disseminated. (Cal. Lab. Code, § 432.7(b).) (*Loder v. Municipal Court, supra*, 17 Cal.3d at 873.) Identical statutory provisions govern the dissemination of criminal record information compiled by local law enforcement agencies. (See Cal. Pen. Code, § 13300 et. seq.)

Similarly, New York restricts access to criminal history information. The New York State Division of Criminal Justice Services is charged with the establishment of a central data facility so that only appropriate officials of "qualified agencies" shall "have access to information . . . , which shall include but not be limited to such information as criminal record, personal appearance data, fingerprints, photographs, and handwriting samples". N.Y. Executive Law § 837(6) (McKinney 1982). Access by non-qualified agencies to the criminal history records for employment or licensing purposes is permitted only if the requesting agency has statutory authority for such access. N.Y. Executive Law § 837 (8-a) (McKinney 1982).

6. California Penal code, section 11143 provides:

"Any person, except those specifically referred to in § 1070 of the Evidence Code, who, knowing he is not authorized by law to receive a record or information obtained from a record, knowingly buys, receives, or possesses the record or information is guilty of a misdemeanor."

California and New York criminal history information is submitted to the FBI with the understanding⁷ that it is, as a matter of law, private, confidential information. Disclosure of this information to the general public through the Freedom of Information Act would surely violate the terms of California's and New York's participation with the Federal Bureau of Investigation. Congress did not contemplate this result when it passed the Freedom of Information Act and California's and New York's participation with the FBI is premised on the understanding that this information will remain confidential. This sharing of information is a voluntary federal/state effort organized for law enforcement purposes. If allowed to stand, the

7. This understanding is based on the federal law which codifies the information gathering practices of the Federal Bureau of Investigation. 28 United States Code section 534 provides in part:

"§534. Acquisition, preservation, and exchange of identification records; appointment of officials

"(a) The Attorney General shall--

"(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and

"(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

"(b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies. . . ." (Emphasis added.)

Court of Appeals' decision will disrupt the spirit of cooperation that is essential to the operation of the FBI/State coalition.

Since criminal history information is by law "private" and "confidential" in California, New York and other states, there is no need for the Court of Appeals' "factual" test for privacy. The determination can be made as a matter of law.

Paradoxically, the Court of Appeals, while openly acknowledging that many of the states which provide criminal history information to the FBI "have policies or laws that forbid the release of their own compiled law enforcement information" *Reporters Comm. etc. v. U.S. Department of Justice, supra*, 831 F.2d at 1125, persists in its flawed analysis of Congress' intent in exempting from the Freedom of Information Act information whose release would constitute an "invasion of privacy." Given that as a matter of law, the release of "compiled criminal history information" is forbidden in many states, the Court of Appeals was wrong in promulgating a procedure to be applied on a nationwide basis, for determining, as a factual matter, a subject's privacy interest in the information to be released. The appropriate procedure should be for the Federal Courts, or the Federal Bureau of Investigation on an administrative basis, to determine, as a matter of law, on a state by state basis, if the information was provided to the FBI as private personal information to be disseminated only for law enforcement purposes or if the compiled information is openly disseminated in the state of origin.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully urge this Court to grant the petition for certiorari to resolve the important issue of the realm of personal privacy Congress intended to exempt from the disclosure provisions of the Freedom of Information Act and to avert the implementation of a judicial procedure that has a grave potential for disrupting federal/state cooperative efforts for exchanging criminal history information.

Respectfully submitted,

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FILED

MAY 25 1988

JOSEPH E. SPANOL, JR.
CLERK

(5)
No. 87-1379

In the Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED
FEBRUARY 16, 1988
CERTIORARI GRANTED APRIL 18, 1988

137 PP

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1379

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

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*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

JOINT APPENDIX

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¹ The relevant opinions of the district court and the court of appeals, the judgment of the court of appeals, and the order of the court of appeals denying rehearing en banc with the statement of those judges dissenting from that order are printed in the appendix to the petition for a writ of certiorari and have not been reproduced.

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PLAINTIFFS

**THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
ROBERT SCHAKNE**

DEFENDANTS

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2. BENJAMIN R. CIVILETTI,
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3. FEDERAL BUREAU OF INVESTIGATION
4. WILLIAM H. WEBSTER, Director Federal Bureau of Investigation

Cause

**5 USC 552
Freedom of Information Act.**

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(1)

DATE	NR	PROCEEDINGS
1979		
Dec	7	COMPLAINT; appearance; exhibits 1-11.
Dec	7	SUMMONS (6) and copies (6) of complaint issued: U.S. Atty. Serv. 12-10-79; #1 and 2 serv. 12-12; #3 and 4 serv. 12-19.
1980		
Jan	9	ANSWER by defts. to complaint.
Jan	9	CALENDARED CD/N
Mar	17	STATUS CALL. Defts to file affidavit and Vaughn index by 4-21-80; further status call set 5-2-80 at 9:30 a.m. (Rep: J. Moore) Penn, J.
Mar	17	APPEARANCE of William A. McDaniel, Jr. as counsel for pltfs.
Apr	2	ORDER filed 4-1-80 allowing pltfs. 30 days to file opposition to motion for summary judgment or request for discovery pursuant to FRCP 56(f); setting case for status hearing on 5-2-80 at 9:30 a.m. (N) Penn, J.
Apr	21	MOTION by defts. for summary judgment; statement of material facts; affidavit of David H. Cook; exhibits A-K; affidavit of C. Kenneth Arnold.
May	12	MOTION by pltfs. for extension of time to 5-23-80 in which to file their request for discovery.
May	16	ORDER filed 5-13-80 granting motion to pltfs. for an extension of time to

DATE	NR	PROCEEDINGS
		5-23-80 to file opposition to motion for summary judgment. (N) Penn, J.
May	23	FIRST request by pltfs. for production of documents.
May	23	FIRST set of interrogatories by pltfs. to defts.
May	23	MOTION by pltfs. for a stay pending discovery of defts. motion for summary judgment; statement of P&A's; affidavit of Daniel J. Meltzer, Esq.; attachments (2).
June	4	REQUEST by pltfs. for oral argument on motion for a stay.
June	5	MOTION by defts. for protective order and opposition to pltfs. motion for a stay pending discovery; statement of P&A's; attachments A and B.
June	16	TRANSCRIPT of proceedings of 3-17-80, pages 1-8. (Rep: J. McGinn); Court copy.
June	17	STATEMENT of P&A's by pltfs. in support of opposition to defts. motion for protective order and reply to opposition to pltfs. motion; exhibits A and B.

DATE	NR	PROCEEDINGS
1980		
June	23	OPPOSITION by pltfs. to defts. motion for a protective order.
July	18	REPLY by defts. to pltfs. opposition to motion for protective order.
Aug.	11	WITHDRAW of APPEARANCE of Keith M. Werhan counsel for deft. and enter appearance of Peter W. Waldmeir.
1981		
Apr.	17	WITHDRAWAL of John B. Kuhns as counsel for pltfs. CD/N
Oct	9	MEMORANDUM ORDER filed 10-8-81 granting motion of pltfs. for a stay; directing defts. to file an index and affidavits within 10 days; denying motion of pltfs for leave to take discovery; granting motion of defts. for protective order. (N) Penn, J.
Oct	19	MOTION by defts. for an enlargement of time in which to comply with this Court's October 8, 1981 Memorandum order; P&As.

DATE	NR	PROCEEDINGS
Oct	28	ORDER filed 10-27-81 granting motion of defts. for enlargement of time to and including 11-16-81 within which to comply with this Court's Memorandum Order of 10-8-81. (Signed 10-23-81) (N) Penn, J.
Nov	16	UNOPPOSED motion by defts. for a two-day enlargement of time in which to comply with this Court's Oct. 8, 1981 memorandum order; P&A's.
Nov	18	MOTION by defts. for enlargement of time to 12-7-81 in which to complete their compliance with this Court's order of 10-8-81; P&A's.
Nov	20	ORDER filed 11-19-81 granting motion of defts. for an extension of time to 11-18-81 to comply with order of 10-8-81. (N) Penn, J.
Nov	20	ORDER filed 11-19-81 granting motion of defts. for an extension of time to 12-7-81 to complete designated search and to file supplemental declarations. (N)
Nov	24	NOTICE of defts of filing; declaration Melvin D. Mercer, Jr w/exhibits A and B; declaration of Anthony T. Riggio w/exhibit A.
Dec	7	MOTION by defts. for enlargement of time in which to serve defts. supplemental declaration of Anthony T. Riggio; P&A's.

DATE	NR	PROCEEDINGS
1981		
Dec 12	12	ORDER filed 12-11-81 granting motion of defts. for an extension of time to 12-11-81 to file supplemental declaration of Anthony T. Riggio with attachments. (N) Penn, J.
Dec 11	11	NOTICE by defts. of filing; supplemental declaration of Anthony T. Riggio; exhibits A and B.
Dec. 14	14	MOTION by defts. for an enlargement of time in which to further respond to this Court's 10-8-81 memorandum opinion; P&A's.
Dec 16	16	STATUS CALL. Defts. to file comprehensive statement and detailed index or a memorandum as to why it should not be filed by 12-29-81. (Rep: J. McGinn) Penn, J.
Dec 17	17	ORDER directing defts. to file by 1-29-82 a further response to memo/order of 10-8-81; to comply with 10-8-81 by filing an index or a memo of law and a memo on certain policy for the last 10 years (N) Penn, J.
Dec 29	29	WITHDRAWAL OF Appearance of Daniel J. Meltzer, Esq. as counsel for pltfs. CD/N
1982		
Jan 6	6	APPEARANCE of Kevin T. Baine as additional counsel for pltfs. CD/N

DATE	NR	PROCEEDINGS
Jan 29	29	MOTION by defts. for an enlargement of time in which to further respond to this Court's 12-17-81 order; P&A's.
Jan 29	29	NOTICE by defts. of filing (FOIA-Search Declarations); attachment 31; attachments A-E; attachment 32; attachments A and B; attachment 33; exhibits A-E; attachment 34; attachments A-W; attachment 35; exhibits A, B, and C.
Jan 29	29	NOTICE by defts. of filing (Dept. of Justice Policy Declarations); attachment 1; exhibits A and B; attachment 2; exhibits A and B; attachments 3 and 4; exhibits A, B, and C; attachment 5; attachment A; attachment 6; exhibit A; attachments 7-10; exhibit A; attachments 11-14; exhibits A and B; attachments 15-18; exhibits A-D; attachments 19-23; attachments A, B, and C; attachments 24-30.
Feb 1	1	MEMORANDUM of P&A's by defts. in partial response to this Court's 12-17-81 order, and in support of defts. argument that they can neither confirm nor deny the existence of the requested records; memorandum.
1982		
Feb 3	3	ORDER filed 2-1-82 granting motion of defts. to and including 2-1-82

DATE	NR	PROCEEDINGS
		within which to serve their further response to this Court's 12-17-81 memorandum order. (N) Penn, J.
Feb	12	APPEARANCE of Kevin T. Baine as counsel for pltfs. CD/N
Feb	19	APPEARANCE of G. David Fensterheim as counsel for pltfs. CD/N
Mar	16	TRANSCRIPT of Proceedings taken on 12-16-81; pps 1-61; Court's copy; Rep: J. M. McGinn.
1983		
Feb	4	MOTION by Pltffs. for summary judgment and opposition to defts' motion for summary judgment; Affidavit of Robert Schakne; Affidavit of Jack C. Landau; Statement of material facts; Exhibits 1 through 11; P&A's; Table of Contents; Table of Authorities.
Feb	17	MOTION by defts. for enlargement of time to serve defts' response to pltffs' Motion for summary judgment and in opposition to defts' motion for summary judgment; P&A's.
Feb	25	ORDER filed 2-23-83 granting motion of defts. for extension of time to 4-18-83 to respond to motion of pltf. for summary judgment. (N) PENN, J.
Apr	15	MOTION by defts. for enlargement of time to respond to pltffs' motion for

DATE	NR	PROCEEDINGS
		summary judgment and memo in opposition to defts' Apr. 21, 1980 motion for summary judgment; P&A's.
Apr	25	ORDER filed 4-20-83 granting motion of defts. for an extension of time to 4-21-83 to respond to motion of pltf. for summary judgment and opposition to motion for deft. for summary judgment. (N) PENN, J.
Apr	29	NOTICE OF FILING by Defts: Attachment—Deft's Suggestion of Partial Mootness w/Exhibits 1 through 8.
Apr	29	MEMORANDUM by defts. of points and authorities in opposition to pltffs' motion for summary judgment, and in reply to pltffs' opposition to defts' April 21, 1983 motion for summary judgment; Table of Contents; Table of Authorities; Attachments A through H.
May	9	MOTION by Pltffs. for enlargement of time to respond to defts' opposition to pltffs' motion for summary judgment; P&A's.
May	12	ORDER filed May 11, 1983, granting motion of pltf. for an extension of time to 5-25-83 to respond to suggestion of defts. (N) PENN, J.
1983		
May	24	MOTION by Pltffs. for enlargement of time in which to respond to defts'

DATE	NR	PROCEEDINGS
		opposition to pltffs' motion for summary judgment; Memo of P&A's.
June	13	REPLY by Pltffs. to deft's memorandum in opposition to pltffs' motion for summary judgment: Exhibits A through D. "Let this be filed" (flat) Penn, J.
June	13	RESPONSE by Pltffs. to defts' suggestion of partial mootness. "Let this be filed" (flat) Penn, J.
Sep	21	MEMORANDUM by defts. of points and authorities in further support of summary judgment and partial mootness; Attachment 1.
1984		
May	7	APPEARANCE of Robert S. Lavet as counsel for defts and withdraw Peter W. Waldmeir. (dj)
May	7	NOTICE of deft of filing the attached; Attachment. (dj)
1985		
Feb	27	REQUEST for pltfs. for oral argument. (vajm)
Apr	16	ORDER setting hearing on cross motion for summary judgment on 5-3-85 at 9:30 a.m. (N) PENN, J. (dj)
May	3	CROSS-MOTION for summary judgment heard and taken under advisement; deft to submit in camera materials by 5-8-85. (Rep. J. McGinn) PENN, J. (dj)

DATE	NR	PROCEEDINGS
May	8	NOTICE of deft of compliance with Court's oral request and filing of in camera declaration. (dj)
Jul	25	ORDER denying motion of pltf. for summary judgment; granting motion of deft. for summary judgment; dismissing case with prejudice. (N) PENN, J. (br)
Aug	5	MEMORANDUM. (N) PENN, J. (fs)
Aug	19	NOTICE by deft. Department of Justice of Compliance with Court's request and filing of in camera declaration. (kc)
Aug	19	MEMORANDUM filed 8-16-85 (N) In camera submission filed under seal in Rm. 1800. PENN, J. (kc)
1985		
Oct	3	NOTICE of Appeal by pltf. from order entered on 7-25-85 and memorandum entered on 8-5-85; \$5.00 filing and \$65.00 docketing fee paid and credited to U.S. Copies mailed to Vincent M. Garvey. (kc)
Oct	9	PRELIMINARY RECORD transmitted to USCA; USCA 85-6020. (kc)
Oct	15	CERTIFICATE OF COUNSEL by pltfs. re: not ordering transcripts. USCA/N RECEIPT ACKNOWLEDGED. (1a)
Oct	15	STATEMENT OF ISSUES by pltf. USCA/N RECEIPT ACKNOWLEDGED. (1a)

DATE	NR	PROCEEDINGS
Oct	23	MOTION by pltfs. to extend the time for filing a New Notice of Appeal, memorandum. USCA/N RECEIPT ACKNOWLEDGED. (1a)
Oct	30	OPPOSITION by defts. to pltfs' motion to extend the time for filing a notice of appeal, exhibits A & B. USCA/N (1a)
Nov.	6	ORDER extending time 10 days from date of entry of order for pltfs. to file a new notice of appeal. (N) JOHN G. PENN, J. USCA/N RECEIPT ACKNOWLEDGED. (1a)
Nov.	8	REPLY MEMORANDUM by pltfs. to defts' opposition to pltfs' motion to extend the time for filing a notice of appeal, exhibits 1 & 2. USCA/N RECEIPT ACKNOWLEDGED. (1a)
Nov.	12	NOTICE by plif. of appeal from order entered on 7-25-85 and memorandum opinions entered 8/5-6/85; \$5.00 filing and \$65.00 docketing fee paid and credited to the U.S.; Copies mailed to Vincent M. Garvey. (df)
Nov	12	PRELIMINARY RECORD transmitted to USCA; USCA #85-6144 (df)
Dec.	20	TRANSCRIPT OF PROCEEDING OF 5-3-85: pages 1-54. (REP. J. MCGINN) (1a)

GENERAL DOCKET**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

85-6020

**REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., APPELLANTS**

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.**APPEAL FROM THE DISTRICT COURT**

COUNSEL: APPELLANT/PETITIONER	TYPE
Kevin T. Baine Williams and Connolly 331-5010 839 17th St., N.W. 20006 Victoria Louise Radd	PRI

Search Group, Inc. movant for leave to file brief as amicus curiae:

Robert R. Belair 778-9023 Kirkpatrick & Lockhart 1800 M Street, N.W. South Lobby 20036	PRI
---	-----

COUNSEL: APPELLEE/RESPONDENT	TYPE
US DOJ 20530 Leonard Schaitman 633-3441 Douglas Letter 633-3427 Appellate Staff Civil Division, Room 3348	US

John F. Daly
 Joseph E. diGenova, USA
 Richard K. Willard

Popular Name:

Number of Case/Order Below: CA 79-03308

Case Type: CV.US.

JS-34: Yes No

Judge Below: Penn (9055)

Date of Judg./Order: 07-25-85 & 08-05-85

USDC Offense/Nature of Suit Code: 2895

Date Docketed: 10-18-85

Date Filed in Dist. Court: 12-07-79

Notice of Appeal Filed: 10-03-85

U.S. Mag: Direct Indirect

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USA	IFP	USDC	RECEIPT
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REMARKS

85-6020

20-E's Supp Memo in Support of Sugg. of Rehear
 En Banc (11/04)

DATE	FILINGS – PROCEEDINGS
(B)10-18-85	Copy of notice of appeal and docket entries from Clerk, DC (n-2)
(B)10-18-85	Docketing fee was paid in the District Court on 10-03-85
(B)10-18-85	Docketing statement was mailed to counsel for appellant
(B)10-18-85	Notice from Clerk, DC with copy of statement pursuant to Rule 10(b)
(J)10-25-85	Notice from Cler, DC attaching motion extend time for filing a new notice of appeal
(T)11-01-85	Notice from Clerk, DC attaching copy of opposition to motion to extend time to file a new notice of appeal [15]
(T)11-07-85	4—Appellant's docketing statement (p-7) [15,23]
(T)11-12-85	Notice from Clerk, DC attaching (1) order and (2) reply memorandum [15]
(E)12-09-85	Clerk's order, sua sponte, that Nos. 85-6020 and 85-6144 are hereby consolidated. A briefing schedule is set as follows: Appellants' brief and appendix or record excerpts—February 18, 1986; Appellees' brief—March 20, 1986; and Appellants' reply brief, if any—April 3, 1986. Based upon the foregoing briefing schedule, the Clerk shall include these cases in the pool of cases that are available for selection on this Court's September, 1986 calendar.

DATE	FILINGS – PROCEEDINGS
(C)02-14-86	4 – Appellants' consent motion to defer preparation of appendix pursuant to Federal Rule of Appellate Procedures 30(c) (p-14) [13]
(C)02-18-86	4 – BRIEF OF APPELLANTS THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL. (p-18) Bin 24-7
(E)03-05-86	Clerk's order granting appellant's motion to defer the filing of the appendix, and this Court's order of December 9, 1985 is revised as follows: Deferred appendix – April 10, 1986 and Final briefs of all parties – April 24, 1986.
(T)03-13-86	4 – Appellees' motion for leave to file a motion out of time for the enlargement of appellees' briefing time. (m-13) [13]
(E)03-24-86	Clerk's order granting appellees' motion to extend briefing time, and the briefing schedule is revised as follows: Appellees' brief – March 27, 1986; Appellant's reply brief, if any – April 10, 1986; Deferred appendix – April 17, 1986; Printed briefs – May 1, 1986. (Leave to file the instant motion is hereby granted.)
(E)03-24-86	4 – Appellees' motion to extend time – GRANTED (m-13)
(H)03-27-86	4 – Appellees' consent motion for leave to file motion out of time for enlargement of briefing time (m-27) (m-13)
(E)04-07-86	Clerk's order granting appellees' motion to extend briefing time, and the briefing

DATE	FILINGS – PROCEEDINGS
	schedule is revised as follows: Appellees' brief – April 3, 1986; Appellant's reply brief, if any – April 17, 1986; Deferred appendix – April 24, 1986; and Printed briefs – May 8, 1986. (Leave to file the instant motion is hereby granted. The Clerk is directed to file the lodged brief of appellees.)
(E)04-07-86	4 – Appellees' motion to enlarge time to file brief – GRANTED (m-27)
(E)04-07-86	15 – APPELLEES' BRIEF (p-3)
(E)04-14-86	4 – Appellants' motion for leave to file motion to extend time to file reply brief (p-4) [13]
(E)04-16-86	Clerk's order granting appellant's motion to extend briefing time, and the briefing schedule is revised as follows: Appellants' reply brief – April 24, 1986; Deferred appendix – May 1, 1986; and Printed briefs – May 15, 1986. (Leave to file the instant motion is hereby granted.)
(E)04-16-86	4 – Appellants' motion to enlarge the time to file reply brief – GRANTED (p-14)
(R)04-28-86	4 – Appellant's reply brief (m-24)
(T)05-01-86	7 – JOINT APPENDIX
(R)05-12-86	15 – APPELLEE'S BRIEF (m-7)
(E)05-15-86	15 – APPELLANTS' (REPORTERS CMTE) BRIEF (p-15)

GENERAL DOCKET

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

85-6020

DATE	FILINGS – PROCEEDINGS
(E)05-15-86	15 – APPELLANTS' (REPORTERS CMTE.) REPLY BRIEF (p-15)
(J)09-23-86	CERTIFIED ORIGINAL RECORD – 3 volumes and 2 transcripts under 2 separate covers
(J)09-23-86	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD – 1 envelope – UNDER SEAL IN VAULT
(J)09-24-86	Clerk's order, <i>sua sponte</i> , that the following times are allotted for oral argument: Appellants – 20 minutes; Appellees – 20 minutes.
(J)10-14-86	Per Curiam order that appellate jurisdiction properly lies in this case, by virtue of the District Court's determination, in the exercise of its sound discretion, to extend the period for filing a notice of appeal. FRAP 4(a)(1), (a)(5). Starr, Silberman, CJs and McGowan, SCJ.
(J)10-15-86	ARGUED before Starr, Silberman, CJs and McGowan, SCJ. (Bin 60-5)
(J)12-03-86	4 – Letter dated 12-02-86 from counsel for appellees advising of additional authorities pursuant to FRAP 28(j) (m-2) (25)

DATE	FILINGS – PROCEEDINGS
(J)12-15-86	4 – Letter dated 12-15-86 from counsel for appellants advising of additional authorities pursuant to FRAP 28(j) (m-15) (25)
(D)04-10-87	Opinion for the Court filed by Circuit Judge Silberman.
(D)04-10-87	Concurring opinion filed by Circuit Judge Starr.
(D)04-10-87	Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby vacated and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.
(D)04-10-87	Mandate order.
(R)04-23-87	5 – Appellant's bill of costs (m-23) [9]
(R)05-26-87	20 – Appellees' petition for rehearing and suggestion of rehearing en banc (p-26) [1]
(R)05-26-87	20 – Motion of Search Group, Inc., et al for leave to file a brief amicus curiae with respect to a petition for rehearing en banc (p-26) [1]
(J)07-02-87	Per Curiam order granting the motion of Search Group, Inc. for leave to file brief amicus curiae and the Clerk is directed to file the lodged brief and that appellants are directed to submit a brief of no more than twenty pages in reply to appellees' petition for rehearing and the brief of amicus curiae in support thereof, and do so on or before July 17, 1987. Starr, Silberman, CJs and McGowan, SCJ.

<u>DATE</u>	<u>FILINGS – PROCEEDINGS</u>
(J)07-02-87	20 – BRIEF OF SEARCH GROUP, INC. AS AMICUS CURIAE – per above order
(R)07-08-87	5 – Appellants' motion to enlarge the time within which to file a brief in reply to ap- pellees' petition for rehearing (p-8) [1]
(J)07-24-87	Clerk's order granting appellants' motion to extend time to file brief in reply to ap- pellees' petition for rehearing to and in- cluding July 24, 1987
(R)07-24-87	20 – Appellant's brief in response to appellee petition for rehearing and suggestion of rehearing en banc (m-24) [1]
(D)10-23-87	Opinion for the Court filed by Circuit Judge Silberman.
(D)10-23-87	Dissenting opinion filed by Circuit Judge Starr.
(J)10-23-87	Per Curiam order denying appellees' peti- tion for rehearing for the reasons set forth in the above opinion. Starr, Silber- man, CJs and McGowan, SCJ.
(R)11-04-87	20 – Appellees' motion for leave to file a supplementary memorandum in support of suggestion of rehearing en banc (m-4) [1]
(J)12-04-87	Per Curiam order denying appellees' mo- tion for leave to file a supplementary memorandum in support of the sugges- tion for rehearing en banc. CJ Wald, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D.H.

<u>DATE</u>	<u>FILINGS – PROCEEDINGS</u>
(J)12-04-87	Per Curiam order en banc denying appellees' suggestion for rehearing en banc. CJ Wald, Robinson, Mikva, Ed- wards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, CJs. (A state- ment of Cir. Judge Starr, jointe by Cir. Judges Bork, Buckley and Sentelle is at- tached. Cir. Judge D.H. Ginsburg did not participate in this order
(R)12-11-87	5 – Appellees' motion to stay the mandate (m-11) [1]
(F)12-28-87	Per Curiam order that appellees' motion to stay mandate is granted and the Clerk is directed to withhold issuance of the court's mandate through Jan. 11, 1988. Starr and Silberman, CJs; McGowan, SCJ.
(R)01-05-88	5 – Appellees' motion to stay the mandate (m-5) [1]
(J)01-28-88	Per Curiam order granting appellees' motion to stay mandate and the Clerk is directed to withhold issuance of the mandate of the Court through February 10, 1988. Starr and Silberman, CJs.
(J)02-02-88	5 – Appellees' motion to stay mandate (m-2) (1)
(J)02-19-88	Per Curiam order that the Clerk is directed to withhold issuance of the court's man- date through February 22, 1988. Starr and Silberman, CJs.

DATE FILINGS – PROCEEDINGS

- (R)02-26-88 Notice from Clerk, Supreme Court advising that petition for certiorari was filed in Supreme Court #87-1379 on 2-16-88 [1]
- (R)04-20-88 Letter from Clerk, Supreme Court advising that petition for writ of certiorari in SC #87-1379 was granted on 04-18-88 [1]

GENERAL DOCKET**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

85-6144

**REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., APPELLANTS**

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

APPEAL FROM THE DISTRICT COURT

COUNSEL: APPELLANT/PETITIONER**TYPE**

Kevin T. Baine 331-5517
 Williams and Connolly
 839-17th St., N.W. 20006
 Victoria Louise Radd

COUNSEL: APPELLEE/RESPONDENT**TYPE**

US DOJ 20530
 John F. Daly 633-3688
 Leonard Schaitman 633-3441
 Civil Division, Rm. 3631

Popular Name:**Number of Case/Order Below: CA 79-03308****Case Type: CV.US.****JS-34: Yes No** **Judge Below: Penn (9055)**

Date of Judg./Order: 07-25-85; 08-05-85 & 08-16-85
 USDC Offense/Nature of Suit Code: 2895
 Date Docketed: 11-29-85
 Date Filed in Dist. Court: 12-07-79
 Notice of Appeal Filed: 11-12-85 (purs. to 11-6-85 order)
 U.S. Mag: Direct Indirect

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REMARKS

 85-6144

**20-E's Supp Memo in Support of Sugg. of Rehear.
En Banc (11/04)**

DATE	FILINGS – PROCEEDINGS
(B)11-29-85	Copy of notice of appeal and docket entries from Clerk, DC (n-2)
(B)11-29-85	Docketing fee was paid in the District Court on 11-12-85
(B)11-29-85	Docketing statement was mailed to counsel for appellants
(E)12-09-85	Clerk's order, sua sponte, that Nos. 85-6020 and 85-6144 are hereby consolidated. A briefing schedule is set as follows: Appellants' brief and appendix or record excerpts – February 18, 1986; Appellees' brief – March 20, 1986; and Appellants' reply brief, if any – April 3, 1986. Based upon the foregoing briefing schedule, the Clerk shall include these cases in the pool of cases that are available for selection on this Court's September, 1986 calendar.
(C)12-16-85	4 – Appellants' docketing statement (m-16) [15,23]
(C)02-14-86	4 – Appellants' consent motion to defer preparation of appendix pursuant to Federal Rule of Appellate Procedures 30(c) (p-14) [13]
(C)02-18-86	4 – BRIEF OF APPELLANTS THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL. (p-18).

DATE	FILINGS – PROCEEDINGS
(E)03-05-86	Clerk's order granting appellant's motion to defer the filing of the appendix, and this Court's order of December 9, 1985 is revised as follows: Deferred appendix – April 10, 1986 and Final briefs of all parties – April 24, 1986.
(T)03-13-86	4 – Appellees' motion for leave to file a motion out of time for the enlargement of appellees' briefing time. (m-13) [13]
(E)03-24-86	Clerk's order granting appellees' motion to extend briefing time, and the briefing schedule is revised as follows: Appellees' brief – March 27, 1986; Appellant's reply brief, if any – April 10, 1986; Deferred appendix – April 17, 1986; and Printed briefs – May 1, 1986. (Leave to file the instant motion is hereby granted.)
(E)03-24-86	4 – Appellees' motion to extend time – GRANTED (m-13)
(H)03-27-86	4 – Appellees' consent motion for leave to file motion out of time for enlargement of briefing time (m-27) [13]
(E)04-07-86	Clerk's order granting appellees' motion to extend briefing time, and the briefing schedule is revised as follows: Appellees' brief – April 3, 1986; Appellant's reply brief, if any – April 17, 1986; Deferred appendix – April 24, 1986; and Printed briefs – May 8, 1986. (Leave to file the instant motion is hereby granted. The Clerk is directed to file the lodged brief of appellees.)

DATE	FILINGS – PROCEEDINGS
(E)04-07-86	4 – Appellees' motion to enlarge time to file brief – GRANTED (m-27)
(E)04-07-86	15 – APPELLEES' BRIEF (p-3)
(E)04-14-86	4 – Appellants' motion for leave to file motion to extend time to file reply brief (p-14) [13]
(E)04-16-86	Clerk's order granting appellants' motion to extend briefing time, and the briefing schedule is revised as follows: Appellants' reply brief – April 24, 1986; Deferred appendix – May 1, 1986; and Printed briefs – May 15, 1986. (Leave to file the instant motion is hereby granted.)
(E)04-16-86	4 – Appellant's motion to enlarge the time to file reply brief – GRANTED (p-14)
(R)04-28-86	4 – Appellant's reply brief (m-24)
(T)05-01-86	7 – JOINT APPENDIX
(R)05-12-86	15 – APPELLEE'S BRIEF (m-7)
(E)05-15-86	15 – APPELLANTS' (REPORTERS CMTE) BRIEF (p-15)
(E)05-15-86	15 – APPELLANTS' (REPORTERS CMTE) REPLY BRIEF (p-15)
(J)09-23-86	CERTIFIED ORIGINAL RECORD – 3 volumes; and 2 transcripts under 2 separate covers
(J)09-23-86	CERTIFIED ORIGINAL SUPPLEMENTAL RECORD – 1 envelope – UNDER SEAL IN VAULT

GENERAL DOCKET

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

85-6144

DATE	FILINGS – PROCEEDINGS
(J)09-24-86	Clerk's order, <i>sua sponte</i> , that the following times are allotted for oral argument Appellants – 20 minutes; Appellees – 20 minutes
(J)10-14-86	Per Curiam order that appellate jurisdiction properly lies in this case, by virtue of the District Court's determination, in the exercise of its sound discretion, to extend the period of filing a notice of appeal. F.R.A.P. 4(a)(1), (a)(5). Starr, Silberman, CJs and McGowan, SCJ.
(J)10-15-86	ARGUED before Starr, Silberman, CJs and McGowan, SCJ. (Bin60-5)
(J)12-03-86	4 – Letter dated 12-02-86 from counsel for appellees advising of additional authorities pursuant to FRAP 28(j) (m-2) (25)
(J)12-15-86	4 – Letter dated 12-15-86 from counsel for appellants advising of additional authorities pursuant to FRAP 28(j) (m-15) (25)
(D)04-10-87	Opinion for the Court filed by Circuit Judge Silberman.
(D)04-10-87	Concurring opinion filed by Circuit Judge Starr.

DATE	FILINGS – PROCEEDINGS
(D)04-10-87	Judgment by this Court that the judgment of the District Court appealed from in these causes is hereby vacated and these cases are remanded, in accordance with the Opinion for the Court filed herein this date.
(D)04-10-87	Mandate order.
(R)-4 = 23-87	5 – Appellant's bill of costs (m-23) [9]
(J)07-02-87	Per Curiam order granting the motion of Search Group, Inc. for leave to file brief amicus curiae and the Clerk is directed to file the lodged brief and that appellants are directed to submit a brief of no more than twenty pages in reply to appellees' petition for rehearing and the brief of amicus curiae in support thereof and do so on or before July 17, 1987. Starr, Silberman, CJs and McGowan, SCJ.
(J)07-02-87	20 – BRIEF OF SEARCH GROUP, INC. AS AMICUS CURIAE – per above order
(R)07-08-87	5 – Appellants' motion to enlarge the time within which to file a brief in reply to appellees' petition for rehearing (p-8) [1]
(J)07-24-87	Clerk's order granting appellants' motion to extend time to file brief in reply to appellees' petition for rehearing to and including July 24, 1987.
(R)07-24-87	20 – Appellant's brief in response to appellees' petition for rehearing and suggestion of rehearing en banc (m-24) [1]

DATE	FILINGS – PROCEEDINGS
(D)10-23-87	Opinion for the Court filed by Circuit Judge Silberman.
(D)10-23-87	Dissenting opinion filed by Circuit Judge Starr.
(J)10-23-87	Per Curiam order denying appellees' petition for rehearing for the reasons set forth in the above opinion. Starr, Silberman, CJs and McGowan, SCJ
(R)11-04-87	20 – Appellees' motion for leave to file a supplementary memorandum in support of suggestion of rehearing en banc (m-4) [1]
(J)12-04-87	Per Curiam order en banc denying appellees' suggestion for rehearing en banc. CJ Wald, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, CJs. (A statement of Cir. Judge Starr, joined by Cir. Judges Bork, Buckley and Sentelle is attached. Cir. Judge D.H. Ginsburg did not participate in this order)
(J)12-04-87	Per Curiam order en banc denying appellees' motion for leave to file a supplementary memorandum in support of the suggestion for rehearing en banc. CJ Wald, Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, CJs.
(R)12-11-87	5 – Appellee's motion to stay the mandate (m-11) [1]

DATE	FILINGS – PROCEEDINGS
(F)12-28-87	Per Curiam order that appellees' motion to stay mandate is granted and the Clerk directed to withhold issuance of the Court's mandate through Jan. 11, 1988. Starr and Silberman, CJs; McGowan, SCJ
(J)01-28-88	Per Curiam order granting appellees' motion to stay mandate and the Clerk is directed to withhold issuance of the mandate of the Court through February 10, 1988. Starr and Silberman, CJs.
(J)02-02-88	5 – Appellees' motion to stay the mandate (m-2) (1)
(J)02-19-88	Per Curiam order that the Clerk is directed to withhold issuance of the mandate through February 22, 1988. Starr and Silberman, CJs.
(R)02-26-88	Notice from Clerk, Supreme Court advising that petition for certiorari was filed in Supreme Court #87-1379 on 2-16-88 [1]
(R)04-20-88	Letter from Clerk, Supreme Court advising that petition for writ of certiorari in SC #87-1379 was granted on 04-18-88 [1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Room 403
1125 15th Street, N.W.
Washington, D.C. 20005

and

ROBERT SCHAKNE
c/o CBS News
A Division of CBS, Inc.
2020 M Street, N.W.
Washington, D.C. 20036

PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF JUSTICE
10th & Pennsylvania Aves., N.W.
Washington, D.C. 20530

and

BENJAMIN R. CIVILETTI
Attorney General
United States Department of Justice
10th & Pennsylvania Aves., N.W.
Washington, D.C. 20530

and

FEDERAL BUREAU OF INVESTIGATION
J. Edgar Hoover Building
9th & Pennsylvania Aves., N.W.
Washington, D.C. 20535

and

WILLIAM H. WEBSTER
Director
Federal Bureau of Investigation
J. Edgar Hoover Building
9th & Pennsylvania Aves., N.W.
Washington, D.C. 20535

DEFENDANTS.

[Dec 7, 1979]

COMPLAINT FOR INJUNCTIVE RELIEF

JURISDICTION

1. This is an action challenging the policy of the Department of Justice and the Federal Bureau of Investigation of refusing to provide, under the Freedom of Information Act, public record criminal justice histories to the public and the press. Specifically, this is an action under the Freedom of Information Act, 5 U.S.C. §552, to compel defendants to produce certain records—namely, any records indicating any arrests, indictments, acquittals, convictions and sentences of Phillip Medico, Charles Medico, or Samuel Medico, by state, local or federal law enforcement agencies or courts. The information sought is limited to matters of public record.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B).

PARTIES

3. Plaintiff THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (hereinafter "The Reporters

Committee") is a voluntary, unincorporated association of working news reporters and editors dedicated to defending First Amendment and freedom of information interests of the public to know about the operation of all forms of government, through the press; the offices of The Reporters Committee are located in Washington, D.C.

4. Plaintiff ROBERT SCHAKNE is employed as a news correspondent by CBS News, a division of CBS, Inc., and sues in his individual capacity as a journalist.

5. Defendant UNITED STATES DEPARTMENT OF JUSTICE (hereinafter "Justice Department") is a department of the Executive Branch of the United States Government. It has possession or control of the records to which plaintiffs seek access. It is responsible, under its regulations, for reviewing appeals from denials by the Federal Bureau of Investigation for access to records pursuant to the Freedom of Information Act.

6. Defendant BENJAMIN R. CIVILETTI is the Attorney General of the United States; he is sued in his official capacity as custodian of the requested documents and as head of the agency in which the requested records are located.

7. Defendant FEDERAL BUREAU OF INVESTIGATION (hereinafter "F.B.I.") is an agency of the United States and has possession or control of the records to which plaintiffs seek access.

8. Defendant WILLIAM H. WEBSTER is the Director of the F.B.I. He is sued in his official capacity as custodian of the requested records and as head of the agency which initially denied plaintiffs' requests.

CAUSE OF ACTION

9. By letter dated February 3, 1978, a copy of which is attached as Exhibit 1, plaintiff Schakne requested that the

Justice Department provide access to the public record criminal justice histories of William Medico (deceased), Phillip Medico, Charles Medico, and Samuel Medico.

10. By letter dated April 4, 1978, a copy of which is attached as Exhibit 2, Robert L. Keuch, Deputy Assistant Attorney General, Criminal Division, Department of Justice, advised plaintiff Schakne that his request had been denied; Mr. Keuch alleged that the requested records were exempt from disclosure pursuant to 5 U.S.C. §552(b)(7)(B) and 5 U.S.C. §552(b)(7)(C).

11. By letter dated April 20, 1978, a copy of which is attached as Exhibit 3, plaintiff Schakne appealed the initial denial of his request by the Department of Justice, Criminal Division.

12. By letter dated April 27, 1978, a copy of which is attached as Exhibit 4, Alien H. McCreight, Chief Freedom of Information-Privacy Acts Branch, Records Management Division, Federal Bureau of Investigation, advised plaintiff Schakne that his request, which had been referred to the F.B.I., had been denied, and alleged that the requested records were exempt from disclosure pursuant to 5 U.S.C. §552(b)(7)(C) and the Privacy Act, 5 U.S.C. §552(a).

13. By letter dated May 5, 1978, a copy of which is attached as Exhibit 5, plaintiff Schakne appealed the initial denial of his request by the F.B.I.

14. By letter dated June 14, 1978, a copy of which is attached as Exhibit 6, Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, Department of Justice, advised plaintiff Schakne that the initial denials of his request had been modified and that the requested records relating to William Medico would be provided; Mr. Shea advised plaintiff Schakne that the denials of his request concerning Phillip Medico, Charles Medico, and Samuel Medico had been affirmed.

15. By letter dated October 2, 1978, a copy of which is attached as Exhibit 7, Robert E. Kent, Assistant Director, Identification Division, Federal Bureau of Investigation, provided the requested records relating to William Medico. The requested records relating to Phillip Medico, Charles Medico, and Samuel Medico have not been provided.

16. By letter dated September 21, 1978, a copy of which is attached as Exhibit 8, Jack C. Landau, acting on behalf of plaintiff The Reporters Committee, requested that the Justice Department provide access to the public record criminal justice histories of William Medico (deceased), Phillip Medico, Charles Medico, and Samuel Medico.

17. By letter dated October 30, 1978, a copy of which is attached as Exhibit 9, Allen H. McCreight, Chief Freedom of Information-Privacy Acts Branch, Records Management Division, Federal Bureau of Investigation, advised The Reporters Committee that its request relating to Phillip Medico, Charles Medico and Samuel Medico, which was referred to the F.B.I., had been denied. Mr. McCreight alleged that the requested records were exempt from disclosure pursuant to the Privacy Act, 5 U.S.C. §552(a).

18. By letter dated December 4, 1978, a copy of which is attached as Exhibit 10, plaintiff The Reporters Committee, appealed the initial denial of its request.

19. By letter dated January 15, 1979, a copy of which is attached as Exhibit 11, Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, Department of Justice, advised The Reporters Committee that the initial denial of its request had been affirmed. Mr. Shea alleged that the requested records were exempt from disclosure pursuant to 5 U.S.C. §552(b)(3) and 5 U.S.C. §552(b)(7)(C).

20. Plaintiffs have exhausted their administrative remedies.

21. Plaintiffs are entitled, pursuant to 5 U.S.C. § 552(a), to inspect and copy the requested records—namely, any records indicating any arrests, indictments, acquittals, convictions and sentences of Phillip Medico, Charles Medico, and Samuel Medico, by state, local or federal law enforcement agencies or courts. The information sought is limited to matters of public records.

WHEREFORE, plaintiffs pray that the Court (1) expedite the proceedings in this action, as provided under 5 U.S.C. § 552(a)(4)(D); (2) enjoin defendants, their agents, officers and employees from withholding the records which plaintiffs have requested and order defendants to produce the requested documents for inspection and copying; (3) award plaintiffs their costs and reasonable attorney's fees in this action, as provided under 5 U.S.C. § 552(a)(4)(E); and (4) grant such other and further relief as the Court may deem just and proper.

WILLIAMS & CONNOLLY

OF COUNSEL:

Jack C. Landau

The Reporters Committee
for Freedom of the Press
Room 403
1125 15th Street, N.W.
Washington, D.C. 20005

By: JOHN B. KUHNS

John B. Kuhns

By: LON S. BABBY

Lon S. Babby

Hill Building
839 17th Street, N.W.
Washington, D.C. 20006

Attorneys for Plaintiffs
The Reporters Committee for
Freedom of the Press and
Robert Schakne

Dated: December 7, 1979

EXHIBIT 1**CBS NEWS**

A Division of CBS, Inc.
2020 M Street, NW
Washington, D.C. 20036
(202) 457-4321

February 3, 1978

Dear Sir:

Under the provisions of the Freedom of Information Act (5USC 552), I hereby request information from the Department of Justice regarding criminal records of William Medico (deceased), Phillip Medico, Charles Medico or Samuel Medico, specifically information about any prison sentences served in federal prisons, any convictions in federal courts, any indictments by federal grand juries or any arrests by federal law enforcement authorities; additionally information known to the Department of Justice about prison sentences, convictions, indictments or arrests by state or local courts and law enforcement agencies involving these four persons.

I call to your attention that the late William Medico was identified in 1970 by the Pennsylvania Crime Commission as having arrests and convictions on his record.

I look forward to your response within ten days.

Sincerely yours,

ROBERT SCHAKNE

Deputy Attorney General
Room 4017
Department of Justice
10th and Pennsylvania NW
Washington D.C.

EXHIBIT 2

**DEPARTMENT OF JUSTICE
WASHINGTON 20530**

FOI/CRM 3486

APR 4, 1978

Mr. Robert Schakne
CBS News
2020 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Schakne:

This is in response to your Freedom of Information Act request, dated February 3, 1978, for records pertaining to William Medico, Phillip Medico, Charles Medico and Samuel Medico.

Your request, as set forth in your February 3, 1978 letter, is hereby denied. Records relating to the subject matter of your request are exempt from disclosure pursuant to 5 U.S.C. 552(b)(7)(A) [investigatory records compiled for law enforcement purposes, the disclosure of which would interfere with enforcement proceedings]. These records are also exempt pursuant to 5 U.S.C. 552(b)(7)(B) [deprive a person of a right to a fair or an impartial adjudication] and 5 U.S.C. 552(b)(7)(C) [constitute an unwarranted invasion of personal privacy]. In addition, disclosure of this material would constitute a violation of the Privacy Act of 1974, and therefore, these records are also exempt pursuant to 5 U.S.C. 552(b)(3) [specifically exempted from disclosure by statute].

Pursuant to 5 U.S.C. § 552(a)(6)(A) and 28 C.F.R. § 16.7(a), you have a right to appeal this denial of your request. This appeal must be made within thirty days in writing and addressed to the Attorney General (Attention:

Office of Information and Privacy Act Appeals) Department of Justice, Washington, D.C. 20530. The envelope and letter should be clearly marked, "Freedom of Information Appeal" or "Information Appeal". If on appeal your request is denied, judicial review will thereafter be available to you in the district in which you reside or have your principal place of business or the district in which the records denied to you are situated or the District of Columbia.

Sincerely,

/s/ ROBERT L. KEUCH

Robert L. Keuch
Deputy Assistant Attorney General
Criminal Division

EXHIBIT 3

CBS NEWS

A Division of CBS, Inc.
2020 M Street, NW
Washington, D.C. 20036
(202) 457-4321

FREEDOM OF INFORMATION APPEAL

April 20, 1978

Dear Sir:

Pursuant to 5 USC 552(a)(6)(A) and 28 CFR 16.7(a), I am hereby appealing the denial of my request for information under the Freedom of Information Act.

By letter of February 3, 1978, I filed a request under the Act for documents relating to "criminal records of William Medico . . . , Phillip Medico, Charles Medico or Samuel Medico . . ." The request specifically included documents relating to sentences, convictions, indictments and arrests in the federal system, as well as information as to local and state criminal records in the possession of the Department.

After a considerable delay, my request was denied in its entirety by a letter dated April 4. The grounds stated for the denial were that all of the documents fell within three categories of "investigatory records" exempt from disclosure under 5 USC 552(b)(7)(A), (b)(7)(B) and (b)(7)(C). Denial was also based on the assertion that "disclosure of this material would constitute a violation of the Privacy Act of 1974" and thus it was "specifically exempted from disclosure by statute" under 5 USC 552(b)(3). I submit that this blanket denial of my request should be reversed as a matter both of law and policy.

First, the use of the "investigatory records" exemptions to deny access to all of the requested documents is on its face inappropriate. For example, most, if not all, of the requested documents would be on the public record in the

jurisdiction in which the criminal justice procedures were invoked. Thus, even assuming that the information could generically be termed "investigatory records compiled for law enforcement purposes" (an assumption I believe to be unjustified), disclosure of such already public information could hardly "interfere with enforcement proceedings," "deprive a person of a right to a fair trial or an impartial adjudication," or "constitute an unwarranted invasion of personal privacy." The fact that the information may be more readily retrievable from the Justice Department makes it no less public in nature and certainly does not justify nondisclosure under the "investigatory records" exemption.

The Department also claims that the records are "specifically exempted from disclosure" by the Privacy Act and thus need not be disclosed under 5 USC 551(b)(3). This assertion that the Privacy Act is an "exemption 3 statute" is unique and puzzling. That Act provides in relevant part that information available to the individual to whom it pertains is not available to third parties unless disclosure is required under the Freedom of Information Act. Quite obviously, to deny access to information under the Freedom of Information Act because it is unavailable to third parties under the Privacy Act is improper and illogical.

Finally, denial of my request is inconsistent with the Department's own policy with regard to the type of information requested. For example, the 1976 revised regulations regarding release of criminal information by agencies receiving LEAA funds reversed the earlier position of the Department and provide no restrictions on the release of conviction data or other criminal history information in Court records of public proceedings. Further, arrest information and other nonconviction data was made largely

available. Under the circumstances, I submit it is incongruous for the Department to bar disclosure of such information in its own possession.

I look forward to your response within 20 days.

Yours truly,

/s/ ROBERT SCHAKNE
Robert Schakne
CBS NEWS Correspondent

Attorney General
Department of Justice
Washington, D.C. 20530
Attention: Office of Information and
Privacy Act Appeals

EXHIBIT 4

**UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535**

April 27, 1978

Mr. Robert Schakne
CBS News
A Division of CBS, Inc.
2020 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Schakne:

This is to acknowledge receipt by the FBI of your Freedom of Information-Privacy Acts request concerning Messrs. William Medico, Phillip Medico, Charles Medico and Samuel Medico. Your request was referred to the FBI by the Department of Justice.

Please be advised that any records which may pertain to your request are exempt from disclosure pursuant to the Freedom of Information Act, Title 5, United States Code, Section 552 (b)(7)(C). This allows the withholding of investigatory records compiled for law enforcement purposes, the disclosure of which would constitute an unwarranted invasion of the personal privacy of another person.

Also, Title 5, United States Code, Section 552a, popularly known as the Privacy Act, specifically Subsection (b) prohibits the release of personal information concerning a living person without that individual's written authorization. This decision is predicated upon a determination that there is insufficient public interest in the subject matter of your request to require release of personal records under the Freedom of Information Act.

If you disagree with this decision, you may appeal to the Attorney General. Appeals should be directed in writing to the Attorney General (Attention: Freedom of Information Appeals Unit), Washington, D.C. 20530. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal."

Sincerely yours,

/s/ ALLEN H. MCCREIGHT

Allen H. McCreight, Chief
Freedom of Information-
Privacy Acts Branch
Records Management Division

EXHIBIT 5

CBS NEWS

A Division of CBS, Inc.
2020 M Street, NW
Washington, D.C. 20036
(202) 457-4321

FREEDOM OF INFORMATION APPEAL

May 5, 1978

Dear Sir:

Pursuant to 5 USC 552(a)(6)(A) and 28 CFR 16.7(a), I hereby appeal the denial by the Federal Bureau of Investigation of my request for information under the Freedom of Information Act.

By letter dated April 4, Robert L. Keuch, Deputy Assistant Attorney General, denied in entirety a Freedom of Information request for documents pertaining to "criminal records of William Medico . . . , Phillip Medico, Charles Medico or Samuel Medico." By letter dated April 20, I filed a Freedom of Information Appeal of that denial.

Subsequently on April 27, I received a denial of my original request for information about the Medico's from the FBI, signed by Allen H. McCreight, on essentially the same grounds cited by the Department of Justice in the letter signed by Mr. Keuch.

I incorporate all the matters cited in my April 20 Freedom of Information Appeal in this appeal of the FBI denial. The information sought is the same, the denial is the same, and this appeal is the same: that this blanket denial of my request should be reversed as a matter of both law and policy.

I look forward to your response.

Yours truly,

/s/ ROBERT SCHAKNE
Robert Schakne
CBS News Correspondent

Attorney General
Department of Justice
Washington, D.C. 20530
Attention: Office of Information and
Privacy Act Appeals

EXHIBIT 6

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

JUN 14, 1978

Mr. Robert Schakne
CBS News
2020 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Schakne:

You requested the Department of Justice to provide to you information "regarding criminal records of William Medico (deceased), Philip Medico, Charles Medico or Samuel Medico." The Criminal Division denied this request in its entirety. The Federal Bureau of Investigation, to which the request was referred after some initial delay, has now also determined to deny the request completely. The Bureau of Prisons correctly responded that it could locate no pertinent records.

After careful consideration of this appeal, I have decided to modify the proposed action of the F.B.I. and to grant your request in part. As a general rule, requests for criminal record information on third parties are correctly answered, neither confirming nor denying that there are records, subject to reconsideration if the requester obtains the consent of the subjects. I am, following this procedure as to Philip Medico, Charles Medico and Samuel Medico, unless you can provide me with either their notarized consent to release to you any materials which may exist, or submit further information to persuade me that the benefits to the general public that would flow from release would outweigh the right of these individuals to have their

personal privacy protected against clearly unwarranted or unwarranted invasion. As to William Medico, however, I am modifying the action of the F.B.I. Your assertion that he is dead is accepted, in reliance on 5 U.S.C. 552a(i)(3), which provides criminal sanctions for obtaining information on an individual through the use of false pretenses. A decedent's privacy interest disappears at his death. Release of material about a decedent can sometimes invade the personal privacy of his heirs to the requisite degree, but it is my judgment that disclosure of criminal record information about a deceased person would not ordinarily do so. Accordingly, after personally inspecting the document in question, I am requesting the Federal Bureau of Investigation to provide you with a copy of the "rap sheet" of William Medico.

If the Criminal Division has information in addition to that being released to you by the F.B.I., it is exempt from mandatory release either as compilation of material, the release of which would constitute a clearly unwarranted invasion of personal privacy, or as consisting of investigatory records compiled for law enforcement purposes, the release of which would constitute an unwarranted invasion of personal privacy. 5 U.S.C. 552(b)(6) and (7)(C). Whenever these exemptions are applicable, any discretionary release of information is prohibited by the Privacy Act of 1974. 5 U.S.C. 552a. Although this application of the Privacy Act is correct, its assertion as an "exemption 3 statute" is not. I have in the past and do again disapprove the attempted use of the Privacy Act as a statute justifying application of this exemption.

As to the action of the Bureau of Prisons, where there are no records there can be no denial of access, and where there has been no denial of access there can be no appeal.

I am acting on this appeal by designation of Attorney General Griffin B. Bell. Judicial review of my action is

available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, which is also where any Criminal Division and Federal Bureau of Investigation records within the scope of your request would be located.

Sincerely,

/s/ QUINLAN J. SHEA, JR.
 Quinlan J. Shea, Jr.
 Director
 Office of Privacy and
 Information Appeals

EXHIBIT 7

**UNITED STATES DEPARTMENT OF JUSTICE
 FEDERAL BUREAU OF INVESTIGATION
 WASHINGTON, D.C. 20537**

October 2, 1978

Mr. Robert Schakne
 CBS News
 2020 M Street, N.W.
 Washington, D.C. 20036

Dear Mr. Schakne:

Reference is made to the letter from Mr. Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, United States Department of Justice, dated June 14, 1978, concerning your request for criminal records of Mr. William Medico and other individuals.

In accordance with Mr. Shea's instructions contained in his letter to you, I am enclosing a copy of Mr. Medico's criminal record as reflected in our identification files.

Sincerely yours,

/s/ ROBERT E. KENT
 Robert E. Kent
 Assistant Director
 Identification Division

Enclosure

FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

The following FBI record, NUMBER 376 599, is furnished FOR OFFICIAL USE ONLY. Information shown on this Identification Record represents data furnished FBI by fingerprint contributors. WHERE DISPOSITION IS NOT SHOWN OR FURTHER EXPLANATION OF CHARGE OR DISPOSITION IS DESIRED, COMMUNICATE WITH AGENCY CONTRIBUTING THOSE FINGERPRINTS.

CONTRIB. OF FINGERPRINTS	NAME AND NUMBER	ARREST. OR REC'D	CHARGE	DISPOSI- TION
SPol Wyoming PA	William Medico 1862	11-8-28	suspicion murder	rel
USM Scranton PA	Wm. Medico 743	2-3-31	vio Nat'l Prohibi- tion Act	rel
PD Passaic NJ	William Medico 2305	2-8-34	disorderly person	90 das in Jail 60 das susp.
SO Paterson NJ	William Medico 2904	2-3-34	disorderly person	30 das Co Jail
SPol Wyoming PA	William Medico 3-B-2645	6-29-61	fugitive (aslt 2nd degree NY State)	ignored

DEAD: William Medico inf rec from FBI Philadelphia PA 7-13-73

EXHIBIT 8

THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS
LEGAL DEFENSE AND RESEARCH FUND
Room 1112 • 1750 Pennsylvania Ave. NW
Washington, DC 20006 • Tel. (202) 347-6888

September 21, 1978

William P. Tyson
Acting Director

Office of the Deputy Attorney General
Executive Office for U.S. Attorneys
Department of Justice
Washington, D.C. 20530

Dear Mr. Tyson:

Under the provisions of the Freedom of Information Act (5 U.S.C. 552) I hereby request, on behalf of the Reporters Committee, information from the Department of Justice regarding the criminal records of William Medico (now deceased), Phillip Medico and Charles Medico, aka Samuel Medico.

I would like information about any arrest, indictment, acquittal, conviction and sentences in reference to the above-named individuals in either the state or federal systems.

I call to your attention that the late William Medico has been identified in 1970 by the Pennsylvania Crime Commission as having arrests and convictions on his record.

For purposes of this request, what is meant by "the Department of Justice" is primarily that building at Tenth and Pennsylvania Avenue and its affiliated offices in the District of Columbia with which I assume you may be familiar.

I offer you this definition of the Department of Justice in view of your somewhat ridiculous letter of July 7. If Ms. Schwed had wanted files and records from the offices of the United States Attorneys, she would have asked for them.

I can only hope, for other persons who may write to you, that you would initially assume a reasonable interpretation of the letter in an effort to help the public obtain information under the Freedom of Information Act rather than attempting to obstruct the implementation of the Act.

If I do not hear from you within ten days, I will assume this request has been denied and I remain,

Sincerely,

/s/ JACK C. LANDAU
Jack C. Landau
Director

EXHIBIT 9

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

October 30, 1978

Mr. Jack C. Landau
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Landau:

This is in reference to your letter dated September 21, 1978, pertaining to William Medico, Phillip Medico and Charles Medico, which was referred to the Federal Bureau of Investigation (FBI) from the Department of Justice on October 16, 1978.

Based on the limited information you provided on William Medico, it is not possible to make an accurate search of our records. To insure an accurate search of our records, please furnish his complete name, date and place of birth, prior addresses, employments, and any specific data that would permit us to locate the documents you seek.

The following paragraphs pertain to your request for information concerning Phillip Medico and Charles Medico.

Please be advised that in handling requests concerning a third party, this Bureau is governed by Title 5, United States Code, Section 552a, popularly known as the Privacy Act, specifically Subsection (b), which prohibits the release of personal information concerning a living person without that individual's written authorization. To confirm or deny investigative interest in the individual you have identified as the subject of your request, would, of

itself, reveal personal information concerning a third person. This decision is predicated upon a determination that there is insufficient public interest in the subject matter of your request to require release of personal records under the Freedom of Information Act.

If you are dissatisfied with this determination, you may appeal the decision by following the instructions set forth below.

You have thirty days from receipt of this letter to appeal to the Deputy Attorney General from any denial contained herein. Appeals should be directed in writing to the Deputy Attorney General (Attention: Office of Privacy and Information Appeals), Washington, D.C. 20530. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal."

If you obtain authorizations from Phillip Medico and Charles Medico, directing the release of information concerning themselves, to you, please have them notarized and submit the originals to this Bureau.

Along with the notarized authorizations, you should also furnish identifying data, such as Phillip Medico and Charles Medico's complete names and dates and places of birth, to insure an accurate search of our records.

Upon receipt of the above-mentioned notarized authorizations and identifying data, we will search the index to our central records and advise you of the results.

Sincerely yours,

/s/ ALLEN H. McCREIGHT,
Allen H. McCreight, Chief
Freedom of Information-
Privacy Acts Branch
Records Management Division

EXHIBIT 10

THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS
LEGAL DEFENSE AND RESEARCH FUND
Room 1112 • 1750 Pennsylvania Ave. NW
Washington, DC 20006 • Tel. (202) 347-6888

December 4, 1978

Benjamin R. Civiletti
Deputy Attorney General
of the United States
Attention: Office of Privacy
and Information Appeals
Washington, D.C. 20530

RE: Freedom of Information Appeal

My Dear Mr. Deputy Attorney General:

I hereby appeal the finding by the FBI in the enclosed October 30 letter declining to provide me with information under the Freedom of Information Act of the arrests, indictments, convictions, acquittals and jail sentences imposed in federal or state courts on Phillip Medico and Charles Medico.

As all of these matters were at one time or continue to be matters of public record, I believe that the FBI has made an erroneous determination that republication of this matter would violate rights to privacy under the Privacy Act.

As the enclosed letter indicates, this appeal is being filed a few days later due to the Thanksgiving holidays and we hope you will waive the 30-day limitation.

Thanking you for your prompt attention, I remain,

Sincerely,

/s/ JACK C. LANDAU
 Jack C. Landau
 Director

EXHIBIT II

UNITED STATES DEPARTMENT OF JUSTICE
 OFFICE OF THE ASSOCIATE ATTORNEY GENERAL
 WASHINGTON, D.C. 20530

JAN 15, 1979

Mr. Jack C. Landau, Director
 The Reporters Committee for Freedom
 of the Press
 Legal Defense and Research Fund
 Room 1112
 1750 Pennsylvania Avenue, N.W.
 Washington, D.C. 20006

Re: Appeal No. 8-2481

Dear Mr. Landau:

You appealed from the action of the Federal Bureau of Investigation on your request for access to the "rap sheets" of Philip and Charles Medico.

After careful consideration of your appeal, I have decided to affirm the initial action in this case. Individuals' rap sheets are not available to third parties pursuant to 5 U.S.C. 552(b)(3) and (7)(C). These pertain to material exempted from release by statute [28 U.S.C. 534(b)] and to investigatory records compiled for law enforcement purposes, the release of which would constitute an unwarranted invasion of the personal privacy of third parties. This information cannot be the subject of a discretionary release.

Judicial review of my action on this appeal is available to you in the United States District Court for the judicial district in which you reside or have your principal place of

business, or in the District of Columbia, which is also where the records you seek are located.

Sincerely,

Michael J. Egan
Associate Attorney General

By: /s/ QUINLAN J. SHEA, JR.

Quinlan J. Shea, Jr.
Director
Office of Privacy and
Information Appeals

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 79-3308

**THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS, ET AL., PLAINTIFFS,**

vs.

**UNITED STATES DEPARTMENT OF
JUSTICE, ET AL., DEFENDANTS,**

AFFIDAVIT OF C. KENNETH ARNOLD

I, C. Kenneth Arnold, being duly sworn, depose and say as follows.

1. I am a Special Agent of the Federal Bureau of Investigation (FBI) and have been so employed for twenty years.

2. I am currently assigned as the Section Chief of the Recording and Posting Sections, Identification Division, FBI, Washington, D.C., and have held that position since March 20, 1978.

3. The statements made herein are based upon my personal knowledge and information available to me in my official capacity.

4. The FBI Identification Division, which was established in 1924 by an Act of Congress, serves as the national repository and clearinghouse for fingerprint records. The authority to operate the Identification Division is found in Title 28, United States Code, Section 534, and Title 28, Code of Federal Regulations (CFR), Sections 0.85(b) and (j).

5. Acting under this authority, the Division has compiled and maintains a file consisting of more than 172,000,000 fingerprint cards. The fingerprint card file is divided into two sections, the Criminal File and the Civil File.

6. The Criminal File consists of:

(a) fingerprint cards submitted by Federal, state and local criminal justice agencies for persons arrested for violations of Federal and state laws; and

(b) incarceration fingerprint cards submitted for persons who are committed to custody after conviction of criminal violations.

The Criminal File contains over 78,000,000 fingerprint cards representing approximately 22,000,000 individuals. A name index, which consists of index cards bearing the name and other physical descriptive information (e.g., date of birth, race, height, and fingerprint classification) contained on each fingerprint card submitted to the Identification Division, is also maintained. The name index cards are filed separately by sex. There are approximately 70,000,000 name index cards which represent the names and aliases on fingerprint cards contained in the Criminal File.

7. The Civil File consists of fingerprint cards submitted by agencies of the United States Government for persons entering the military services, persons seeking employment with the United States Government, persons applying for visas to enter the United States, and aliens seeking permanent residence and/or citizenship. The Civil File is maintained separately from the Criminal File. The Civil File contains approximately 94,000,000 fingerprint cards representing approximately 43,000,000 persons. A name index, similar to that of the Criminal File, containing approximately 104,000,000 index cards, is also maintained.

8. An FBI identification record, often referred to as a "rap sheet," is a listing of fingerprints submitted to and retained by the FBI in connection with arrests and, in certain instances, fingerprints submitted in connection with employment, naturalization or military service. The identification record includes the name of the agency or institution which submitted the fingerprints to the FBI. If the fingerprints submitted to the FBI concern a criminal offense, the identification record includes the date arrested or received, arrest charge information and disposition data concerning the arrest if known to the FBI. All such data included in an identification record are obtained from the contributing local, state and Federal agencies. The FBI Identification Division is not the source of such data reflected on an identification record.

9. FBI identification records are established and maintained primarily for the benefit of the criminal justice community. Information from identification records is of value to these agencies for determining background information and the extent of an individual's prior arrest record. Criminal justice agencies also request copies of identification records during investigations to assist in identifying suspects. These records are furnished to judicial system officials for purposes of setting bail and imposing sentence. They are furnished to places of incarceration to determine the type and length of custody. Parole and probation officials use identification records when determining periods of supervision. A secondary purpose for which these records are maintained is to furnish them to authorized agencies to assist in the making of informed decisions concerning certain employment and license applications.

* 10. Fingerprint cards submitted by Federal agencies are the property of the United States Government and will

be removed from Identification Division files only upon receipt of a Federal court order directing such action.

11. The Identification Division serves as the custodian of fingerprint cards submitted voluntarily by non-Federal criminal justice agencies and will return any fingerprint card to the contributor upon its request. In such instances, it is not necessary that the non-Federal contributors furnish a court order directing the return of the fingerprint card.

12. The Identification Division has purging procedures approved by the Archivist of the United States which provide that criminal justice fingerprint cards are destroyed when the subject of the record becomes age 80 and civil fingerprint cards are destroyed when the subject of the record becomes age 75.

13. The Identification Division is prohibited from furnishing information from identification records to third party requesters except when authorized to do so by Federal statute. The following statutes provide authority for dissemination of identification records:

(a) Title 28, United States Code, Section 534, provides the authority for furnishing identification records to Federal, state and local criminal justice agencies for criminal justice purposes and to other agencies of the Federal Government for official purposes;

(b) Public Law 92-544, Section 201, 86 Stat. 1115, provides authority for the Identification Division to furnish identification records to federal chartered or insured banking institutions, and to state and local governments for purposes of employment and licensing when state law requires the checks and the state law is approved by the Attorney General;

(c) Public Law 94-29, Section 14(f)(2), 89 Stat. 97,140 provides authority for the Identification Division to con-

duct criminal record checks on persons employed in certain segments of the securities industry; and

(d) Public Law 95-405, Section 17, 92 Stat. 874, provides authority for the Identification Division to conduct criminal record checks on certain persons employed in the commodity futures trading industry.

If a third party request for an identification record cannot be accommodated under one of the statutes mentioned in this paragraph, the requester is advised that the Identification Division is without authority to honor the request.

14. It should be noted that although the FBI is prohibited from disseminating information from identification records to third parties, except as indicated above, the subject of an FBI identification record may obtain a copy of his/her identification record by complying with the provisions of Title 28, CFR, Section 16.32.

15. Additionally, it is emphasized that the Identification Division will not furnish records in response to non-Federal employment and licensing inquiries under the authority to Public Laws 92-544, 94-29, and 95-405 on the basis of "Name Check" requests. A "Name Check" is a search of the Identification Division's Criminal File name index based on the name and physical description furnished by the requester. Non-Federal employment and licensing requests will be honored only when the requester submits a fingerprint card for the applicant. This policy is premised on the fact that fingerprints provide a positive means of identification; and, because of the size of the Identification Division's Criminal File name card index, it is not possible to positively identify the applicant based upon name and physical description. Further, if a record possibly identical with the subject of the inquiry was furnished in response to a name check request, the recipient might not be able to determine if the record subject was in fact identical with the applicant. The information

necessary to resolve the question of identity is contained in the files of the criminal justice agency which furnished the record to the Identification Division. This agency may be prevented by statute or regulation from providing information from its files to non-Federal employment and licensing agencies and the requester would be unable to resolve the question of identity. A response to an employment and licensing inquiry based only upon name and physical descriptive information could result in substantial injury to the applicant if a record was located based on similar descriptive information but was in fact, not identical with the applicant. Also, without a fingerprint card search, it is not possible to locate an identification record if the individual was arrested under a name (e.g., an alias) different from that on the employment or licensing application.

16. Before an FBI identification record is disseminated for non-Federal employment and licensing purposes, it is reviewed and any entry more than one year old without a disposition is deleted. This policy is followed to reduce possible denials of employment opportunities or licensing privileges to individuals as a result of the dissemination of identification records not containing final dispositional data concerning criminal charges brought against such individuals. This policy is codified in Title 28, CFR, Sections 50.12(b) and 20.33(a)(3).

17. Responses to Federal, state, and local criminal justice agencies for criminal justice purposes and to agencies of the Federal Government for official purposes will be accepted on the basis of name checks. Any record furnished in reply contains a prominently placed admonition stating:

"Since neither fingerprints nor an identifying number which is indexed in our files accompanied your re-

quest, FBI cannot guarantee in any manner that this material concerns the individual in whom you are interested."

This caveat serves as a warning to the recipient that the record may or may not be identical with the subject of the inquiry and that the recipient should resolve this question before taking any action based upon the record.

Name check requests from criminal justice agencies and Federal agencies are honored because these agencies have the resources to resolve the question of identity. Criminal justice agencies have a nationwide telecommunications network over which inquiries may be made. Also, there is generally no prohibition against a criminal justice agency furnishing information from its files to a similar agency for criminal justice purposes. This access often provides the data necessary to resolve the question of identity. Additionally, criminal justice name check inquiries are made when seeking suspects, and individuals with similar names and descriptive information are pertinent to these inquiries. The Federal Government, because of its size, has similar resources at its disposal for resolving questions of identity.

The Identification Division limits the name searches it will conduct for Federal, state and local criminal justice agencies and agencies of the Federal Government. A name search will not be conducted if it is determined that the request is on a very common name unless a date of birth is furnished. Even when a date of birth is furnished, a search will not be conducted if it is determined that there is more than one file drawer of name index cards (1,200 cards) for that name. Further, if an attempt is made to conduct the search where only an approximate age is given, the search is terminated when it becomes obvious that there are numerous records possibly identical with the subject of the

search. At this point, the requester is advised that it will be necessary to furnish additional identifying data if a search is to be conducted.

/s/ C. KENNETH ARNOLD

C. Kenneth Arnold
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and sworn to before me this 21st day of April,
1980.

/s/ ANN LEE BALASSA
Notary Public

My Commission expires 4-30-83

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS' COMMITTEE FOR FREEDOM OF THE
PRESS, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF
JUSTICE, ET AL., DEFENDANTS

AFFIDAVIT OF DAVID H. COOK

I, David H. Cook, being duly sworn, depose and say as follows.

(1) I am a Special Agent (SA) of the Federal Bureau of Investigation (FBI) and have been so employed for 14 years.

(A) I am assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Branch, Records Management Division (RMD), FBI Headquarters (FBIHQ), Washington, D.C.

Due to the nature of my official duties, I am familiar with the procedures followed in processing Freedom of Information Act (FOIA) requests received at FBIHQ, and with plaintiffs' FOIA requests from having reviewed the correspondence pertaining thereto. I am, also, familiar with the various exemptions allowed under the FOIA wherein documents or portions thereof may be withheld from disclosure.

Correspondence Relative to Plaintiff's FOIA Requests

(2) The following are items of correspondence with plaintiffs:

Request of Robert Schakne

(A) By letter dated February 3, 1978, to the Deputy Attorney General (DAG), DOJ, Washington, D.C., plaintiff Robert Schakne requested, pursuant to the FOIA, information from the DOJ about federal and state prison sentences, convictions, indictments or arrests for William Medico (deceased), Phillip Medico, Charles Medico or Samuel Medico. (A true copy of this letter is attached hereto and made a part hereof as Exhibit A).

(B) By letter dated April 4, 1978, to Mr. Schakne, from Robert L. Keuch, Deputy Assistant Attorney General, Criminal Division, DOJ, Washington, D. C., Mr. Schakne's request was acknowledged. Mr. Schakne was advised that his request was denied, since records relating to the subject matter of his request are exempt from disclosure pursuant to Title 5, United States Code, Section 552 (b)(7)(A), (b)(7)(B), (b)(7)(C) and (b)(3). He was further advised of appeal procedures. (A true copy of this letter is attached hereto and made a part hereof as Exhibit B).

(C) By letter dated April 20, 1978, to the Attorney General (AG), DOJ, Washington, D. C., Mr. Schakne appealed the initial denial of his request by the Criminal Division of the DOJ. (A true copy of this letter is attached hereto and made a part hereof as Exhibit C).

(D) By letter dated April 27, 1978, to Mr. Schakne, from Allen H. McCreight, former Chief, FOIPA, RMD, FBIHQ, Washington, D. C., Mr. Schakne's FOIA request was acknowledged as having been referred to the FBI from the Criminal Division of the DOJ. Mr. Schakne was advised that any records which may pertain to his request

are exempt from disclosure pursuant to the FOIA, specifically Title 5, United States Code, Section 552, (b)(7)(C). He was also advised that Title 5, United States Code, Section 552a, popularly known as the Privacy Act, specifically Subsection (b), prohibits the release of personal information concerning a living individual without that individual's written authorization (subject to certain specified exceptions). He was further advised of appeal procedures. (A true copy of this letter is attached hereto and made a part hereof as Exhibit D).

(E) By letter dated May 5, 1978, to the AG, DOJ, Washington, D. C., Mr. Schakne appeals the denial by the FBI of his FOIA request. (A true copy of this letter is attached hereto and made a part hereof as Exhibit E.)

(F) By letter dated June 14, 1978, to Mr. Schakne, from Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, DOJ, Washington, D. C., Mr. Schakne was advised that Mr. Shea had affirmed the denial of records concerning Phillip Medico, Charles Medico and Samuel Medico. However, Mr. Shea indicated that he had modified the FBI's denial of records as they pertain to William Medico who is allegedly deceased, and that he had requested the FBI to provide a copy of the decedent's "rap sheet" to Mr. Schakne. Mr. Schakne was also advised of judicial review procedures. (A true copy of this letter is attached hereto and made a part hereof as Exhibit F).

(G) By letter dated October 2, 1978, to Mr. Schakne, from Robert E. Kent, Assistant Director (former), Identification Division, FBIHQ, Washington, D. C., Mr. Schakne was furnished a copy of the Identification Record ("rap sheet") of Mr. William Medico as reflected in the Identification Division files. (A true copy of this letter and the "rap sheet" of Mr. William Medico is attached hereto and made a part hereof as Exhibit G.)

**Request of Jack C. Landau on Behalf of Plaintiff
Reporters' Committee for Freedom of the Press**

(H) By letter dated September 21, 1978, to William P. Tyson, Acting Director, Office of the Deputy Attorney General, Executive Office for U.S. Attorneys, Washington, D. C., Jack C. Landau, Director, Reporters' Committee for Freedom of the Press (Reporters' Committee), acting on behalf of plaintiff Reporters' Committee, requested, pursuant to the FOIA, criminal records of William Medico (now deceased), Phillip Medico and Charles Medico, aka Samuel Medico. Mr. Landau indicated that he would like "information about any arrest, indictment, acquittal, conviction and sentences in reference to the above-named individuals in either the state or federal systems." (A true copy of this letter is attached hereto and made a part hereof as Exhibit H).

(I) By letter dated October 30, 1978, to Mr. Landau, from Allen H. McCreight, former Chief, FOIPA Branch, RMD, FBIHQ, Washington, D. C., Mr. Landau's FOIA request was acknowledged as having been referred to the FBI from the DOJ. Mr. Landau was advised that based on the limited information he provided on William Medico, it was not possible to make an accurate search of our records. He was requested to furnish additional identifying data. Further, Mr. Landau was advised that notarized authorizations from Messieurs Phillip Medico and Charles Medico would be needed before we could begin processing his request, otherwise such information would be exempt from disclosure pursuant to Title 5, United States Code, Section 552a, popularly known as the Privacy Act, specifically Subsection (b), which prohibits the release of personal information without that individual's written authorization (subject to certain specified exceptions). (A true copy of this letter is attached hereto and made a part hereof as Exhibit I).

(J) By letter dated December 4, 1978, to Benjamin R. Civiletti, former DAG, Washington, D.C., Mr. Landau appealed the denial by the FBI of his FOIA request as to Phillip and Charles Medico. (A true copy of this letter is attached hereto and made a part hereof as Exhibit J).

(K) By letter dated January 15, 1979, to Mr. Landau, from Michael J. Egan, Associate Attorney General, by Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, DOJ, Washington, D. C., Mr. Landau was advised that his appeal of the initial action of the FBI denying his request for access to the "rap sheets" of Phillip and Charles Medico was affirmed pursuant to Title 5, United States Code, Section 552 (b)(3) and (b)(7)(C). He was also advised of judicial review procedures. (A true copy of this letter is attached hereto and made a part hereof as Exhibit K).

(3) Explanation of FBI procedures when requests are made for Criminal Identification Records ("rap sheets") by individuals who are not the subjects thereof.

(A) When a request is made under the FOIA to the FBI for criminal identification records ("rap sheets") by individuals who are not the subjects thereof ("third party requesters"), it is the FBI's policy to deny the FOIA request on the basis of Title 5, United States Code, Section 552 (b)(3). Title 5, United States Code, Section 552 (b)(3), provides for the withholding of information specifically exempted from disclosure by statute. Title 28, United States Code, Section 534 is the enabling statute for FBI's the Identification Division's compilation of criminal identification records ("rap sheets"). It is the FBI's position that when Title 28, United States Code, Section 534 was enacted, Congress only intended for identification records to be disseminated to authorized officials of specified governments and institutions, and not to individuals not specified

by statute. (See Affidavit of Special Agent C. Kenneth Arnold, which is filed herewith). Plaintiffs, therefore, have been denied the identification records, should any exist, regarding Phillip Medico, Charles Medico or Samuel Medico, pursuant to exemption (b)(3) of the FOIA, in view of Title 28, United States Code, Section 534.

(B) It is the FBI's position that if the Court should hold that Title 28, United States Code, Section 534 is not an exemption (b)(3) statute, the FBI would balance the privacy interests of the named individual(s) whose identification record is sought by a third party FOIA request against the public's interest in disclosure of the requested information under exemption (b)(6) of the FOIA. Title 5, United States Code, Section 552 (b)(6) exempts from release under the FOIA, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Identification records are a compilation of arrest data and conviction data often from diverse geographical areas and over an extensive time-period. The information contained therein is often incomplete. The disclosure of this information, particularly with regard to reformed or rehabilitated individuals who may not have been notorious or whose notoriety may have diminished, could subject these individuals to unnecessary and unfounded public attention, harassment, criticism, and embarrassment. To disclose information contained in an individual's "rap sheet," or indeed the existence of the "rap sheet," to a member of the general public, could result in substantial injury to the individual's reputation. Information such as this, if revealed, could also subject individuals to repeated

intrusions into their private lives long after their misdeeds were uncovered.

/s/ DAVID H COOK

David H. Cook

Special Agent

Federal Bureau of Investigation

Washington, D.C.

Subscribed and sworn to before me this 18th day of April, 1980.

/s/ LEE ANN WOESLAGLE

Notary Public

My Commission expires April 30, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

DECLARATION OF MELVIN D. MERCER, JR.

I, Melvin D. Mercer, Jr., being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI) and have been so employed for sixteen years.

(2) I am currently assigned as the Section Chief of the Recording and Posting Sections, Identification Division, FBI Headquarters (FBIHQ), Washington, D.C., and have held that position since January 12, 1981. I am familiar with the procedures followed in processing and responding to requests for information contained in the FBIHQ Identification Division Records System made pursuant to the Freedom of Information Act, Title 5, United States Code, Section 552, and the Privacy Act, Title 5, United States Code, Section 552a.

(3) The statements made herein are based upon my personal knowledge and information available to me in my official capacity. This Declaration has been prepared to answer in part this Court's Order of October 8, 1981,

in which the Court inquired with respect to "(1) the extent of the search made for the requested information[,] (2) the policy for the last ten years in handling requests for 'rap sheets' by other than law enforcement personnel, (3) the kinds of records which defendants are claiming to be exempt from discovery, and (4) a comprehensive statement setting forth any exceptions, other than those listed in the present affidavits, to the Section 552(b)(3) claim for exemption." This Declaration will respond for the Identification Division of FBIHQ to each of those inquiries, as supplemented by all other relevant and pertinent Affidavits filed in this matter. As fully described in ¶ 9 of this Declaration, because of the nature of the records requested by plaintiffs for individuals other than William Medico (e.g., records concerning arrests, indictments, acquittals, convictions, or sentences), this Declaration constitutes the Government's submissions, consistent with the requirements of *Vaughn v. Rosen*, 159 US App DC 340 (1973), *cert. denied*, 414 US 977 (1974), as directed by this Court's Memorandum Order at page 3.

The Policy For The Last Ten Years In Handling Requests For "Rap Sheets" By Other Than Law Enforcement Personnel

(4) The FBI Identification Division maintains an FBI Identification Records System which serves as the national repository and clearinghouse for fingerprint records. The authority to operate the Identification Division Records System is found in Title 28, United States Code (U.S.C.), Section 534, and Title 28, Code of Federal Regulations (C.F.R.), Sections 0.85(b) and (j). As more fully explained in the April 21, 1980 Affidavit of C. Kenneth Arnold (filed in this matter as an exhibit to Defendants' Statement Of Points And Authorities In Support Of Motion For Summary Judgment), the FBI Identification Division Records System is the central repository for arrest and conviction

identification records—commonly referred to as “rap sheets”—which constitute listings of fingerprints submitted to and retained by the FBI in connection with the arrest, indictment, acquittal, conviction or sentencing of an individual. As fully explained in the Affidavit of C. Kenneth Arnold, no relevant or pertinent records other than rap sheets are located in the FBIHQ Identification Division Records System.¹

(5) In accordance with the FBI Identification Division's interpretation of Title 28, U.S.C., Section 534, between 1971 and September 24, 1973 it was the policy of the FBI not to release a rap sheet to any requestor other than law enforcement personnel at any time.² This prohibition included denial of a rap sheet's release to even that person who was the subject of the rap sheet, unless such release was ordered by the Court.

(6) This policy of not releasing rap sheets to any requestor other than law enforcement personnel was continued until September 24, 1973. By order 556-73 dated

¹ As explained in the accompanying Affidavit of Anthony T. Riggio, Freedom of Information-Privacy Acts Section, Records Management Division, FBIHQ, rap sheets may also be located with other documents concerning an individual's arrest, indictment, acquittal, conviction or sentencing in the FBIHQ Central Records System. The FBIHQ Central Records System is a separate records system maintained by the Records Management Division of the FBI and is distinct from the Identification Division Records System maintained by the Identification Division of the FBI.

² As more fully explained in the Affidavit of C. Kenneth Arnold, rap sheets may be released pursuant to federal law for certain licensing and employment purposes which are neither relevant here nor, as I understand this Court's inquiry, contemplated by this Court's Order. See also 28 C.F.R. Part 20, Subpart C. This Declaration is therefore limited to the policy for handling requests for “rap sheets” by third parties such as plaintiffs and under the circumstances requested by plaintiffs only.

September 24, 1973 (as amended in insignificant part on October 27, 1978), the Attorney General of the United States directed that the FBI publish rules for the dissemination of arrest and conviction identification records to the subjects of such records upon proper request. In accordance with Order 556-73, it is the policy of the FBI to release a copy of an identification record to the subject thereof upon submission to the Identification Division of (i) a written request by the subject, (ii) satisfactory proof of identity of the person whose record is requested—including the person's name, date and place of birth, and set of rolled-inked fingerprint impressions—and, (iii) a processing fee of five dollars. See 28 C.F.R. § 20.34. (True copies of the original Order 556-73 as it was published in Volume 38, Number 228, page 32806 of the *Federal Register* on November 28, 1973, and the revised Order 556-73, published in Volume 43, Number 209, pages 50173-50174 of the *Federal Register* on October 27, 1978, are attached hereto and are made a part hereof as Exhibits A and B, respectively.)

Any Exceptions, Other Than Those Listed In The Present Affidavits, To The Section 552(b)(3) Claim For Exemption

(7) With regard to any additional exceptions for Title 5, U.S.C., Section 552(b)(3) releases, other than those listed in prior Affidavits filed with this Court, I am not aware of the release of FBIHQ identification records to third parties other than law enforcement personnel such as plaintiffs except for the instance described in the April 18, 1980 Affidavit of David H. Cook (filed in this matter as an exhibit to Defendants' Statement Of Points And Authorities In Support Of Motion For Summary Judgment), which involves an individual named William Medico. In that instance, plaintiffs' third party request to release the identification record of a person named William

Medico was originally refused. By letter dated June 14, 1978, from Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, Department of Justice, Washington, D.C., to third party requestor—Robert Schakne, however, Mr. Shea modified that initial denial of identification records as they pertain to a person named William Medico, who was alleged to be deceased. Mr. Shea directed that a copy of the rap sheet for an allegedly deceased person named William Medico be provided to Mr. Schakne. The release of the individual named William Medico's identification record to a third party requestor in compliance with Mr. Shea's June 14, 1978 decision is unique in that it is the only exception known to me where the FBI Identification Division's policy of not releasing identification records to third party requestors other than law enforcement personnel has not been followed. It is the policy of the FBIHQ Identification Division to continue to deny all such third party requests for the release of rap sheets, even in those instances where the purported subject of the rap sheet is known to be or is alleged to be deceased.

The Extent Of The Search Made For The Requested Information, And The Kinds Of Records Which Defendants Are Claiming To Be Exempt From Discovery

(8) With respect to the Court's inquiry regarding the extent of the search made for information requested by plaintiffs, I can only reiterate what has been previously stated in the April 21, 1980 Affidavit of C. Kenneth Arnold who preceded me in the capacity of Section Chief, Recording and Posting Sections, Identification Division, FBIHQ. At page 5 of that Affidavit, ¶ 15, Special Agent Arnold discussed the "name check" search procedures used by the Identification Division to locate identification records in the Identification Division Records System upon the receipt of a request for such records from

criminal justice and/or federal agencies. That same procedure was used to determine whether a rap sheet could be located for any individuals named William Medico, Phillip Medico, Charles Medico, or Samuel Medico. The result of the search of the name William Medico located one rap sheet which, as indicated in ¶ 7 of this Declaration, was released to plaintiffs at the direction of Mr. Shea.¹

(9) I cannot state on the public record whether the above search of the Identification Division Records System did or did not locate any identification record(s) containing the information requested by plaintiffs as to Phillip Medico, Charles Medico or Samuel Medico. All I can state is that, if such identification record(s) did exist, it would not be discoverable, and it would be exempt from disclosure pursuant to Title 5, U.S.C., Section 552(b)(3), (b)(6), and (b)(7)(C). To even reveal on the public record the existence of any identification record or other document memorializing the type of information which plaintiffs seek—let alone to disclose the specific contents of any record which plaintiffs request—would publicly affirm that an individual had been the subject of arrest, indictment, acquittal, conviction, sentencing, or investigation interest, for whatever reason. Public acknowledgement of the mere existence of such a record could substantially

¹ It is the FBI's position that, based on the limited information provided by plaintiffs, i.e., first and last name only, the FBI cannot state that this rap sheet is, in fact, the rap sheet of the William Medico with respect to whom plaintiffs purport to seek information. To ensure that the rap sheet provided to plaintiffs is absolutely responsive to their request, plaintiffs would have to provide the fingerprints of the individual named William Medico on which they seek a rap sheet, in addition to that person's full name and date and place of birth. This corroborating information, however, has not been provided with respect to any of the named individuals with respect to whom plaintiffs purport to seek records.

damage the reputation of that individual, hold that individual out to public scrutiny and ridicule resulting in likely embarrassment and personal discomfort, possibly occasion either direct or indirect economic loss with respect to employment, financial opportunities, licensing, education or other such concerns, invite the imposition of social stigma, and patently constitute a clearly unwarranted invasion of his or her personal privacy. These manifestly undesirable consequences are further compounded where, as here, it cannot be definitely established either (i) that the requested record in fact concerns the individual with respect to whom plaintiffs purport to seek such information for general public disclosure and without having shown a public necessity for such information, or (ii) that the requested record is either accurate or complete. Moreover, to deny the existence of the requested record(s) when there is none, but to refuse to either confirm or deny the existence of the requested record(s) where such record(s) exists, would constitute a course of action that itself reveals that such record(s) exists and would thereby also constitute a clearly unwarranted invasion of personal privacy. Therefore, it is the policy of the Records Management Division to neither confirm nor deny the existence of the requested records, with the unique exception of the instance involving a person named William Medico who is allegedly deceased. Any further information as to the existence or nonexistence of records containing the information sought by plaintiffs could reveal material that is exempt and, therefore, could only be provided *in camera*.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 18, 1981.

/s/ MELVIN D. MERCER, JR.
MELVIN D. MERCER, JR.
Special Agent
Federal Bureau of Investigation
Washington, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

DECLARATION OF ANTHONY T. RIGGIO

I, Anthony T. Riggio, being duly sworn, depose and say as follows:

(1) I am a Special Agent of the Federal Bureau of Investigation (FBI) and have been so employed for eight years. I am currently assigned in a supervisory capacity in the Freedom of Information-Privacy Acts (FOIPA) Section, Records Management Division, FBI Headquarters (FBIHQ), Washington, D.C., and have held that position for two years. I am familiar with the procedures followed in processing requests for information contained in the FBIHQ Records Management Division Central Records System made pursuant to the Freedom of Information Act, Title 5, United States Code, Section 552, and the Privacy Act, Title 5, United States Code, 552a. I was recently assigned to supervise the FOIPA requests of plaintiffs and am familiar with the procedures used to process and respond to those requests.

(2) The statements made herein are based upon my personal knowledge and information available to me in my official capacity. This Affidavit has been prepared to

answer in part this Court's Order of October 8, 1981, in which the Court inquired with respect to "(1) the extent of the search made for the requested information . . . , (3) the kinds of records which defendants are claiming to be exempt from discovery, and (4) a comprehensive statement setting forth any exceptions, other than those listed in the present affidavits, to the Section 552(b)(3) claim for exemption." This Affidavit will respond for the Records Management Division of FBIHQ to each of those inquiries, as supplemented by all other relevant and pertinent Affidavits filed in this matter. As fully explained in ¶ 6 of this Declaration, because of the nature of the records requested by plaintiffs for individuals other than William Medico (e.g., records concerning arrests, indictments, acquittals, convictions, or sentences), this Declaration constitutes the Government's submission, consistent with the requirements of *Vaughn v. Rosen*, 157 US App. DC 340 (1973), *cert. denied*, 415 US 977 (1974), as directed by this Court's Memorandum Order of October 8, 1981 at page 3.

**The Extent Of The Search Made For The Requested Information,
And The Nature And Description Of The Documents Being Withheld**

(3) As explained in the accompanying Affidavit of Special Agent Melvin D. Mercer, Jr., of the FBIHQ Identification Division, the initial search for the requested information was limited to a search of the FBIHQ Identification Division Records System for two reasons. First, plaintiffs' request was deemed to be for criminal identification records only, i.e., "rap sheets." Second, plaintiffs did not provide the additional necessary identifying information (e.g., fingerprints, dates and places of birth, prior addresses, employments, notarized consent of the subject to such release, etc.) required to undertake a further search for other identifiable information concerning the pur-

ported subjects of their request in the Central Records System which includes, but is not limited to, rap sheets. This initial search of the Identification Records System disclosed the existence of a rap sheet for an allegedly deceased individual named William Medico; that rap sheet has already been provided to plaintiffs.

(4) Pursuant to this Court's October 8, 1981 Order, an additional, expanded search of the Central Records System under the control of the Records Management Division was conducted under the names William Medico, Charles Medico, Phillip Medico and Samuel Medico.¹ The Central Records System is separate and distinct from the Identification Division Records System described in the accompanying Declaration of Melvin D. Mercer, Jr. In contrast to the Identification Division Records System, which maintains only rap sheets, the Central Records System maintains other records pertaining, *e.g.*, to the ar-

¹ The Central Records System enables the FBI to maintain, in one centralized location, all pertinent information in the possession of the FBI deemed worthy of retention which has been acquired in the course of fulfilling its investigative responsibilities. The Central Records System at FBIHQ is the primary records system maintained by the FBI. The FBI Central Records System contains administrative, applicant, personnel, and investigative files compiled for law enforcement purposes. This system consists of a numerical sequence of files broken-down according to subject matter. The subject matter of a file may relate to an individual, organization, company, publication, or foreign intelligence activity. Communications originating at FBIHQ and those received from FBI Field Offices and sources outside the FBI are directed to the Records Management Division at FBIHQ for entry into the appropriate Central Records System file. It should be noted that rap sheets may or may not be included in the Central Records System. However, if a particular individual's rap sheet exists, it would be maintained within the FBIHQ Identification Division Records System.

rest, indictment, acquittal, conviction or sentencing of an individual, including, but not limited to, rap sheets.²

(5) A search of the active index to the general indices of the Central Records System under the name William Medico disclosed one "see reference" document pertaining in part to an individual of that name which relates to plaintiffs' request concerning any arrests, indictments, acquittals, convictions or sentences for an individual of that name.³ The arrest, indictment, and sentencing informa-

² The FBI also maintains two additional records systems which reflect investigative activity. These systems are the National Crime Information Center (NCIC) system and the Electronic Surveillance (ELSUR) Indices. The NCIC is a computerized record system composed of nine separate files. Only one of those files, the Computerized Criminal History (CCH) files, would contain information of the type requested by plaintiffs. However, the CCH files have not been searched since they are based on and are redundant of the FBIHQ Identification Division Records System rap sheet information which has been searched. The ELSUR Indices is an index card system located at FBIHQ consisting of 3" x 5" index cards on which are maintained: (1) the name of each person monitored or the proprietor of the premises on which an electronic surveillance was conducted by the FBI since January 1, 1960, and (2) a source number to identify the electronic surveillance, the date the conversation occurred, the location of the field office which conducted the monitoring, and the address and/or telephone number where the electronic surveillance occurred. These index cards would not reflect information of the type requested by plaintiffs, and a search of the ELSUR Indices would therefore not be either pertinent or relevant to plaintiffs' request.

³ Access to the Central Records System is provided by a general indices, arranged in alphabetical order, consisting of approximately 60 million index cards on various subject matters, including names of individuals. The index cards in the general indices fall into two general categories: "main" index cards and "see" (*i.e.*, cross-reference) index cards. A "main" index card contains the name of an individual, organization, activity, or other title, which is the principal subject of a file maintained in the Central Records System (*i.e.*, a known subject,

tion contained in that one "see reference" document is confined to two paragraphs on page 15 of that 38-page document dated September 15, 1958. The arrest, indictment, and sentencing information contained therein was compared with the already-released identification record for the allegedly deceased individual named William Medico. Based on that comparison, I believe that the information in these two relevant paragraphs on page 15 of that 38-page document pertains to the same allegedly deceased individual named William Medico who is the assumed subject of the identification record already released to plaintiffs. Therefore, these two paragraphs are being released

suspect or victim). A "see" index card bears the name of an individual, organization, or activity, which is referred to in, but is not the main subject of, a file contained in the Central Records System. A "main" index card is automatically prepared at the time the FBI becomes involved in the investigation of a possible violation of federal law within its investigative jurisdiction. At that time, the names of known subject(s), suspect(s), or victim(s), are set forth in case-caption and subsequently indexed in the "main" file. The decision to further index the names of additional subjects, and/or other names or information appearing on a document, for "see" references is made by the investigative Agent in a field office and the supervising Agent at FBIHQ.

The general indices is comprised of an active index and an inactive index. While a search has been completed of the "active index" as described in this Declaration, a search of the "inactive index" of the general indices of the Central Records System has not been completed. The Records Management Division is presently endeavoring to expeditiously complete its search of the inactive index to ensure that a full and complete search for the records sought by plaintiffs—including but not limited to rap sheets—is undertaken and to fully satisfy this Court's Order. The Government has therefore concurrently sought leave of this Court to enlarge the time period for complying with this Court's Order, in further part, so that such search may be completed and a Supplemental Declaration(s) may be filed, if necessary.

with this Declaration as Exhibit A consistent with the prior release of the above-mentioned rap sheet of an individual named William Medico. Since no other information found on page 15, or any other page of that 38-page document pertains to the arrest, indictment, acquittal, conviction or sentencing of the individual named William Medico, the other information on those pages has been deemed not pertinent to plaintiffs' request and, therefore, is not addressed further by this Declaration.

(6) I cannot state on the public record whether the above search of the active index to the general indices of the Central Records System did or did not locate any record—including, but not limited to, rap sheets—containing the information requested by plaintiffs, regarding the individuals named by plaintiffs other than the allegedly deceased individual named William Medico whose rap sheet and other pertinent information discussed in ¶ 5 of this Declaration has already been provided to plaintiffs. All I can state is that, if such requested information did exist, it would not be discoverable, and it would be exempt from disclosure pursuant to Title 5, U.S.C., Section 552(b)(3), (b)(6), and (b)(7)(C). To even reveal on the public record the existence of any identification record or other document memorializing the type of information which plaintiffs seek—let alone to disclose the specific contents of any record which plaintiffs request—would publicly affirm that an individual had been the subject of arrest, indictment, acquittal, conviction, sentencing, or investigative interest, for whatever reason. Public acknowledgement of the mere existence of such a record could substantially damage the reputation of that individual, hold that individual out to public scrutiny and ridicule resulting in likely embarrassment and personal discomfort, possibly occasion either direct or indirect economic

loss with respect to employment, financial opportunities, licensing, education or other such concerns, invite the imposition of social stigma, and patently constitute a clearly unwarranted invasion of his or her personal privacy. These manifestly undesirable consequences are further compounded where, as here, it cannot be definitely established either (i) that the requested record in fact concerns the individual with respect to whom plaintiffs purport to seek such information for general public disclosure and without having shown a public necessity for such information, or (ii) that the requested record is either accurate or complete. Moreover, to deny the existence of the requested record(s) when there is none, but to refuse to either confirm or deny the existence of the requested record(s) where such record(s) exists, would constitute a course of action that itself reveals that such record(s) exists and would thereby also constitute a clearly unwarranted invasion of personal privacy. Therefore, it is the policy of the Records Management Division to neither confirm nor deny the existence of the requested records, with the unique exception of the instance involving a person named William Medico who is allegedly deceased. Any further information as to the existence or nonexistence of records containing the information sought by plaintiffs could reveal material that is exempt and, therefore, could only be provided *in camera*.

The Kinds Of Records Which Defendants Are Claiming To Be Exempt From Discovery

(7) This Court has further requested that it be advised of the kinds of records which are claimed to be exempt from discovery. As more fully explained in ¶ 6 of this Declaration, I can only state on the public record that, with the exception of the records pertaining to the individual

named William Medico, any such record, or any information in any form of the kind requested by plaintiffs, whether located in the Central Records System, the Identification Division Records System or otherwise, would not be discoverable and would be exempt from disclosure.

Any Exceptions, Other Than Those Listed In The Present Affidavits, To The Section 552(b)(3) Claim For Exemption

(8) With respect to this Court's inquiry regarding the FBI's reliance on any exceptions to the Title 5, U.S.C., Section 552(b)(3) claim for exemption, other than those listed in the Affidavits previously filed with this Court, I wish to reiterate the statements found in the April 18, 1980 Affidavit of David H. Cook (filed in this matter as an exhibit to Defendants' Statement Of Points And Authorities In Support Of Motion For Summary Judgment) that any records containing the information which plaintiffs seek – should they exist – regarding Phillip Medico, Charles Medico, or Samuel Medico, would be exempt from disclosure pursuant to Title 5, U.S.C., Section 552(b)(3) and (b)(6). In addition, I wish to advise the Court that an exemption would also be claimed pursuant to Title 5, U.S.C., Section 552(b)(7)(C). With regard to the assertion of exemption (b)(7)(C) in this instance, if exemption (b)(3) is determined by this Court not to be applicable, as with exemption (b)(6) the FBI would balance the privacy interests of that individual on whom the requested information is sought against the public's interest in disclosure of that information if it exists. The justification for assertion of the (b)(7)(C) exemption in this matter is the same as that provided for the (b)(6) exemption discussed on pages 6 and 7 of the Affidavit of David H. Cook. The type of information sought by plaintiffs would, if released, be as easily an "unwarranted" invasion of privacy as a "clearly unwar-

ranted" invasion of privacy and should therefore be exempt from disclosure, if such information exists.

(9) As more fully explained in the accompanying Declaration of Melvin D. Mercer, Jr., I am not aware of the release to third party requestors such as plaintiffs of FBIHQ identification records, or any information in any form of the kind requesting by plaintiffs, except for the instance involving the release to plaintiffs of a rap sheet for an allegedly deceased individual named William Medico as directed by Mr. Shea. Furthermore, it is only because of this limited and unique exception that the information contained in the attached Exhibit A to this Declaration is being released to plaintiffs herewith.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 18, 1981.

/s/ ANTHONY T. RIGGIO
ANTHONY T. RIGGIO
Special Agent
Federal Bureau of Investigation
Washington, D.C.

RIGGIO EXHIBIT A

WILLIAM MEDICO was arrested in 1931 for violation of U.S. Probation laws and served time for this in the Luzerne County Jail, Wilkes-Barre, Pa.

In 1935 he was arrested in New Jersey in what has been described as a raid on a gambling establishment and served time for this also. His last arrest in 1947 by the Pennsylvania Liquor Control Board for purchasing liquor, using the name of a club in Pittston, Pa., as the purchaser, and for possession of liquor on which the Pennsylvania tax had not been paid. The Grand Jury did not indict him on these charges.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

AFFIDAVIT OF ROBERT SCHAKNE

I, ROBERT SCHAKNE, having been duly sworn, do hereby depose, under penalty of perjury, as follows:

1. I am a news correspondent employed by CBS News, a division of CBS, Inc., and a plaintiff in this action.
2. I make this affidavit in support of Plaintiffs' Motion for Summary Judgment filed herein.
3. I have read the accompanying Statement of Material Facts As To Which There Is No Genuine Dispute.
4. All the facts recited therein are true and correct to the best of my knowledge and belief.

/s/ ROBERT SCHAKNE
Robert Schakne

Subscribed to and sworn to before me
this 31 day of January, 1983.

/s/ [sig illegible]
Notary Public

My commission expires November 30, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

AFFIDAVIT OF JACK C. LANDAU

I, JACK C. LANDAU, having been duly sworn, do hereby depose, under penalty of perjury, as follows:

1. I am a director of the Reporters Committee for Freedom of The Press, a plaintiff in this action.
2. I make this affidavit in support of Plaintiffs' Motion for Summary Judgment filed herein.
3. I have read the accompanying Statement Of Material Facts As To Which There Is No Genuine Dispute.
4. All the facts recited therein are true and correct to the best of my knowledge and belief.

/s/ JACK C. LANDAU
Jack C. Landau

Subscribed to and sworn to before me
this 3rd day of February, 1983.

/s/ DIANE BINGHAM
Notary Public

My commission expires March 31, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS

**STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE DISPUTE**

1. Plaintiff the Reporters Committee for Freedom of the Press (hereinafter "The Reporters Committee") is a voluntary unincorporated association of working news reporters and editors dedicated to defending First Amendment and freedom of information interests of the public.

2. Plaintiff Robert Schakne is a news correspondent employed by CBS News, a division of CBS, Inc.

3. In January, 1978, there were several published reports that the U.S. Attorney in Philadelphia, David Marston, was investigating two Democratic Congressmen from Pennsylvania, Joshua Eilberg and Daniel Flood, for alleged conflict of interest and corruption.

4. CBS News assigned plaintiff Schakne, a correspondent in its investigative unit, to investigate the allegations about Congressman Daniel Flood.

5. Congressman Flood at the time was a senior member of the House of Representatives and Chairman of the House Appropriations Subcommittee.

6. In the course of Mr. Schakne's investigation, he learned that Congressman Flood had been instrumental in arranging certain Defense Department contracts for Medico Industries.

7. Mr. Schakne also learned that William Medico, General Manager of Medico Industries, had been identified by the federal Bureau of Narcotics and the Pennsylvania Crime Commission as a "criminal associate" of organized crime leader Russel Bufalino.

8. The Pennsylvania Crime Commission report also stated that William Medico had a criminal record which included "arrests for suspicion of murder and assault, and convictions for bootlegging and disorderly conduct."

9. The Pennsylvania Crime Commission report listed Medico Industries as one of a number of "legitimate businesses dominated by organized crime figures [which] have received a number of lucrative public contracts."

10. Because of the great public interest in the investigation of Congressman Flood, and the potential newsworthiness of the relationship of an allegedly corrupt congressman to a business reportedly dominated by organized crime, Mr. Schakne sought further information about the principals behind Medico Industries, i.e., the Medico family.

11. Plaintiff Schakne believed that the newsworthiness and relevance of the connection between Congress Flood and the Medicos would depend, in part, on the type of criminal record possessed by the Medicos. For example, a record of bribery, embezzlement or other financial crime by any of the principals of Medico Industries would potentially be a matter of great public interest since the company was receiving millions of dollars of federal funds.

12. Mr. Schakne, therefore, obtained the names of the principals of Medico Industries from Standard and Poor's Directory and orally requested information about their

public record criminal justice history from Justice Department press officer, Robert Stevenson.

13. Mr. Stevenson denied Mr. Schakne the requested information and advised him to file a formal FOIA request.

14. By letter dated February 3, 1978 (attached hereto as Exhibit 1), plaintiff Schakne, pursuant to the Freedom of Information Act, requested of the Department of Justice "information . . . regarding the criminal records of William Medico (deceased), Phillips Medico, Charles Medico or Samuel Medico." The letter specifically pointed out that William Medico had been identified by the Pennsylvania Crime Commission as having arrests and convictions on his record.

15. By letter dated April 4, 1978 (attached hereto as Exhibit 2), Robert L. Keuch, Deputy Assistant Attorney General, advised plaintiff Schakne that his request had been denied in its entirety on the ground that the information sought is exempt from disclosure pursuant to exemptions 7(A), 7(B), and 7(C) of the Freedom of Information Act and pursuant to the Privacy Act as incorporated by exemption 3 of the FOIA.

16. By letter dated April 20, 1978 (attached hereto as Exhibit 3), plaintiff Schakne appealed this initial denial of his request.

17. By letter dated April 27, 1978 (attached hereto as Exhibit 4), Allen H. McCreight, Chief, Freedom of Information - Privacy Acts Branch, Records Management Division, Federal Bureau of Investigation, advised plaintiff Schakne that his request, which had been referred to the F.B.I., had been denied in its entirety on the ground that the information sought is exempt from disclosure pursuant to exemption 7(C) of the FOIA and the Privacy Act.

18. By letter dated May 5, 1978 (attached hereto as Exhibit 5), plaintiff Schakne appealed this initial denial of his request by the F.B.I.

19. By letter dated June 14, 1978 (attached hereto as Exhibit 6), Quinlan J. Shea, Jr., Director, Office of Privacy and Information Appeals, Department of Justice, advised plaintiff Schakne that the initial denials of his request had been modified and that records relating to William Medico would be provided. Mr. Shea further advised plaintiff Schakne that the denials of his request as it related to Phillip, Charles, and/or Samuel Medico had been affirmed on the ground that the information is exempt from disclosure pursuant to exemptions 6 and 7(C) of the FOIA. Mr. Shea specifically declined to rely on exemption 3, stating his disapproval of the use of the Privacy Act as an exemption 3 statute.

20. On October 2, 1978, the F.B.I. provided plaintiff Schakne with a copy of the criminal identification record (*i.e.*, "rap sheet") of William Medico.

21. By letter dated September 21, 1978 (attached hereto as Exhibit 7), Jack C. Landau, on behalf of The Reporters Committee, requested of the Department of Justice "information . . . regarding the criminal records" of William Medico (deceased), Phillip Medico, Charles Medico, and/or Samuel Medico. The letter specifically pointed out that William Medico had been identified by the Pennsylvania Crime Commission as having arrests and convictions on his record.

22. By letter dated October 30, 1978 (attached hereto as Exhibit 8), Allen H. McCreight, Chief, Freedom of Information - Privacy Acts Branch, Records Management Division, Federal Bureau of Investigation, advised The Reporters Committee that its request relating to Philip, Charles and/or Samuel Medico, which had been referred to the F.B.I., had been denied on the ground that the in-

formation sought is exempt from disclosure pursuant to the Privacy Act.

23. By letter dated December 4, 1978 (attached hereto as Exhibit 9), plaintiff The Reporters Committee appealed this initial denial of its request.

24. By letter dated January 15, 1979 (attached hereto as Exhibit 10), Quinlan, J. Shea, Jr., Director, Office of Privacy and Information Appeals, Department of Justice, advised The Reporters Committee that the initial denial of its request had been affirmed on the ground that the information sought is exempt from disclosure pursuant to 28 U.S.C. § 534(b) as incorporated by FOIA exemption 3, and exemption 7(C) of the FOIA.

25. By letter dated March 13, 1979 (attached hereto as Exhibit 11), Attorney General Griffin Bell, in response to inquiries from CBS News, wrote to Mr. Fred Graham at CBS News (with a copy to plaintiff Schakne) to explain the "Department's policy with regard to releasing individual criminal history records under the Freedom of Information Act." Attorney General Bell explained that after "a thorough review" of the Department's "policy and practice" it was "unanimously concluded that FOIA requests for an individual's criminal records might well result in the release of voluminous material, but that we are prohibited by statute and case law from releasing certain records which may be contained in the F.B.I.'s identification files, commonly known as 'rap sheet.'" Criminal history information contained in documents other than "rap sheets," Bell explained, "might be released if not otherwise exempt under the Freedom of Information Act." The Attorney General went on to explain that the Department's release of William Medico's "rap sheet" to plaintiff Schakne stemmed from the fact that "the Department's position on the release of 'rap sheet' has not been clear in the past. . . . [A]fter comprehensive review given this issue,

. . . [the Department] is now of the view that we are prohibited from releasing *any* "rap sheets" except as specifically authorized by law."

26. On April 21, 1980, defendants moved this Court for Summary Judgment on the ground that the records sought "are specifically exempted from disclosure to the press and the general public under 28 U.S.C. 534 and, accordingly, are within Exemption 3 of the FOIA." Alternatively, defendants contend that the information sought "may be exempt from disclosure under Exemption 6 of the FOIA." Defendants, however, "have not undertaken a balancing analysis in the present case because" they argue, "the blanket Exemption 3 claim is dispositive of plaintiffs' FOIA request."

27. On December 11, 1981, defendants supplied plaintiffs with additional documents pertaining to William Medico, with various excisions and deletions.

28. On January 19, 1982, defendants supplied plaintiffs with additional documents pertaining to William Medico, with various excisions and deletions.

29. To date, defendants continue to withhold from plaintiffs all information of any kind concerning the requested criminal justice history information relating to Phillip, Charles, and/or Samuel Medico.

30. All information sought by plaintiffs is already a matter of public record.

Respectfully submitted,

WILLIAMS & CONNOLLY

/s/ G. DAVID FENSTERHEIM

Kevin T. Baine
 G. David Fensterheim
 839 17th Street, N.W.
 Washington, D.C. 20006
 (202) 331-5000

Counsel for Plaintiffs

Dated: 1/31/83

**UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA**

Civil Action No. 79-3308

**THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
 ET AL., PLAINTIFFS**

v.

**UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
 DEFENDANTS**

Hon. JOHN GARRETT PENN

**NOTICE OF FILING:
 DEFENDANTS' SUGGESTION OF PARTIAL MOOTNESS
 PRELIMINARY STATEMENT**

This Freedom of Information Act (FOIA) suit seeks "to compel defendants to produce certain records—namely, any records indicating any arrests, indictments, acquittals, convictions and sentences of Phillip Medico, Charles Medico, or Samuel Medico," Complaint at ¶ 1. Several issues in this suit have been mooted by the occurrence of two recent, unanticipated events beyond defendants' control. Accordingly, plaintiffs' claims as to those issues should be dismissed.

STATEMENT OF THE CASE

As the documents attached as Exhibits 1 through 8 relate, defendants have administratively released all criminal information concerning two subjects of plaintiffs' FOIA request—a Phillip and a Samuel Medico—who have

recently died.¹ Defendants have administratively searched all of their systems of records to which plaintiffs' request was referred, and have administratively released the attached documents solely to be consistent with the unique, pre-litigation administrative decision of Mr. Quinlan J. Shea, Jr., former Director of the Department of Justice Office of Privacy and Information Appeals, to release criminal information concerning a William Medico, who was likewise deceased. *See Plaintiffs' Statement Of Material Facts As To Which There Is No Genuine Dispute at Exhibit 6 (January 31, 1983)* (hereinafter "Plaintiffs' Statement"). *See also Defendants' Notice Of Filing (FOIA – Search Declarations) (January 29, 1982)* (filed in response to this Court's December 17, 1981 Order). Plaintiffs' FOIA request for criminal information concerning Phillip and Samuel Medico, therefore, has been administratively fulfilled under the unique circumstances of this request.²

¹ As set forth in Defendants' Notice of Filing (FOIA – Search Declarations) (January 29, 1982), two components of the Department of Justice to which plaintiffs' request had been referred—the Bureau of Prisons and the Executive Office for United States Attorneys—did not locate any responsive records concerning any subject of plaintiffs' request. The attached documents therefore further respond for only the three remaining Department of Justice components to which plaintiffs' request had been referred: the Federal Bureau of Investigation, the Drug Enforcement Administration, and the Criminal Division.

² Defendants' unique administrative release of a deceased individuals' criminal information under the particular circumstances of this request does not constitute a waiver of FOIA exemptions with respect to either the remaining Charles Medico's (or any other person's) rap sheet, if any exists. *See Murphy v. Federal Bureau of Investigation*, 490 F. Supp. 1138 at 1141 (D.D.C. 1980), citing *Krohn v. Department of Justice*, No. 79-0667 at 4-5 (D.D.C. September 7, 1979); *Safeway Stores, Inc. v. FTC*, 428 F. Supp. 346 at 347 (D.D.C. 1977).

Further, plaintiffs have now advanced, and defendants have administratively discerned, a legitimate public interest purpose in the administrative disclosure of "financial crime" information concerning the only remaining subject of plaintiffs' FOIA request, a Charles Medico. Plaintiffs' Statement at ¶ 11 (January 31, 1983). See Plaintiffs' Statement Exhibit 6 (where defendants requested an articulation of the public interest underlying plaintiffs' request on June 14, 1978). As the documents attached as Exhibits 1 through 8 relate, defendants have administratively searched all of their systems of records to which plaintiffs' request was referred—other than the Federal Bureau of Investigation Identification Division's fingerprint card, or "rap sheet", files—but have located no financial crime information concerning a Charles Medico to be administratively released in the public interest.³ Plaintiffs' FOIA request for financial crime information concerning a Charles Medico which might be summarized in any record other than a rap sheet, therefore, has been administratively fulfilled under the unique circumstances of this request.

³ As fully explained in Defendants' Memorandum Of Points and Authorities In Opposition To Plaintiffs' Motion For Summary Judgment, And In Reply To Plaintiffs' Opposition To Defendants' April 21, 1980 Motion For Summary Judgment at Part III, A and B (April 29, 1983), filed simultaneously herewith, defendants maintain that they can neither confirm nor deny whether any *non-financial* crime information might be summarized in *any* record maintained by defendants. FOIA disclosure of any such non-financial crime information which might be summarized in any record maintained by defendants, including a rap sheet, would not be in the public interest and would constitute either a clearly unwarranted or an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6) or (b)(7)(C). Alternatively, FOIA disclosure of any rap sheet of a Charles Medico which might contain either financial or non-financial crime information is

ARGUMENT

Defendants' administrative release of the above information has rendered plaintiffs' judicial request for that information moot. As stated in *Perry v. Block*, 684 F.2d 121 (D.C. Cir. 1982): "[H]owever fitful or delayed the release of information under the FOIA may be, once all requested records are surrendered, federal courts have no further statutory function to perform." *Id.* at 125. Likewise, this Circuit has held in *Crooker v. United States State Department*, 628 F.2d 9 (D.C. Cir. 1980) that "[o]nce records are produced the substance of the [FOIA] controversy disappears and becomes moot since the disclosure which the suit seeks has already been made." *Id.* at 10. *Accord Turner v. Schweiker*, No. 81-1485, 2 G.D.S. ¶ 81,311 at 81,852 (D.C. Cir. 1981); *Ackerly v. Long*, 420 F.2d 1136 at 1340 (D.C. Cir. 1969). At least that portion of this FOIA suit which seeks to compel disclosure of criminal information concerning a deceased Phillip and Samuel Medico, as well as that portion of this suit which seeks to compel disclosure of financial crime information concerning a Charles Medico, therefore, should be dismissed as moot.⁴ The information which plaintiffs had sought through

exempted from disclosure by 28 U.S.C. § 534 in accordance with FOIA Exemption 3, 5 U.S.C. § 552(b)(3).

Based on plaintiffs' January 31, 1983 statement of public interest in, and intended use of, only "financial crime" information, it appears that plaintiffs may have abandoned their request for any other criminal information, if in fact plaintiffs ever actually sought or meant to seek such information. If plaintiffs have in fact narrowed their request to seek financial crime information only, then any previous issue concerning FOIA disclosure of non-financial crime information also is moot. See Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Dispute at ¶ 11 (January 31, 1983).

⁴ If plaintiffs do not seek information as to non-financial crimes concerning a Charles Medico, if any, that claim also should be dismissed as moot.

their FOIA suit has been administratively disclosed as a result of unanticipated events beyond defendants' control which recently occurred.

CONCLUSION

For the foregoing reasons, this suit should be dismissed as moot in pertinent part.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

/s/ BARBARA L. GORDON
BARBARA L. GORDON

/s/ PETER W. WALDMEIR
PETER W. WALDMEIR

Attorneys, Department of Justice
Civil Division, Rm. 3326
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Attorneys for Defendants.

EXHIBIT 1

**U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530**

April 29, 1983

Mr. Robert Schakne
CBS News
2020 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Schakne:

This is in reference to your February 3, 1978 Freedom of Information Act (FOIA) request pertaining to "William Medico (now deceased), Phillip Medico, Charles Medico, or Samuel Medico." The requested information pertaining to a deceased William Medico has been released beginning June 14, 1978.

Both Phillip and Samuel Medico have died since the filing of your FOIA request. We therefore conducted a new search of the Criminal Division central index but found no documents responsive to your request concerning these two deceased individuals. If a rap sheet had been discovered during a search of Criminal Division records, it would have been referred to the Federal Bureau of Investigation (FBI) for direct response to you under the FOIA.

With respect to your FOIA request concerning a Charles Medico, we have determined that the disclosure of any financial crime information which might be found in Criminal Division records would be in the public interest as contained in FOIA exemptions 6 and 7(C), 5 U.S.C. §552(b)(6) and (b)(7)(C). A search of Criminal Division records, however, has produced no financial crime information concerning a Charles Medico.

The Criminal Division continues to maintain that it can neither confirm nor deny whether any other criminal information concerning a Charles Medico might be found in its records. Disclosure of any other criminal information concerning a Charles Medico would constitute either a clearly unwarranted or an unwarranted invasion of privacy. If a rap sheet had been discovered during a search of Criminal Division records concerning a Charles Medico, that record would have been referred to the FBI for direct response to you under the FOIA.

This latter will supplement the Criminal Division's response to your FOIA request based on the above information which recently has come to the agency's attention.

Sincerely,

DOUGLAS S. WOOD

DOUGLAS S. WOOD

Associate Director

Office of Legal Support Services
Criminal Division

EXHIBIT 2

**U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530**

April 29, 1983

Mr. Jack C. Landau, Director
The Reporters Committee for
Freedom of the Press
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

This is in reference to your September 21, 1978 Freedom of Information Act (FOIA) request pertaining to "William Medico (now deceased), Phillip Medico, Charles Medico, or Samuel Medico." The requested information pertaining to a deceased William Medico has been released beginning June 14, 1978.

Both Phillip and Samuel Medico have died since the filing of your FOIA request. We therefore conducted a new search of the Criminal Division central index but found no documents responsive to your request concerning these two deceased individuals. If a rap sheet had been discovered during a search of Criminal Division records, it would have been referred to the Federal Bureau of Investigation (FBI) for direct response to you under the FOIA.

With respect to your FOIA request concerning a Charles Medico, we have determined that the disclosure of any financial crime information which might be found in Criminal Division records would be in the public interest as contained in FOIA exemptions 6 and 7(C), 5 U.S.C. §552(b)(6) and (6)(7)(C). A search of Criminal Division

records, however, has produced no financial crime information concerning a Charles Medico.

The Criminal Division continues to maintain that it can neither confirm nor deny whether any other criminal information concerning a Charles Medico might be found in its records. Disclosure of any other criminal information concerning a Charles Medico would constitute either a clearly unwarranted or an unwarranted invasion of privacy. If a rap sheet had been discovered during a search of Criminal Division records concerning a Charles Medico, that record would have been referred to the FBI for direct response to you under the FOIA.

This latter will supplement the Criminal Division's response to your FOIA request based on the above information which recently has come to the agency's attention.

Sincerely,

DOUGLAS S. WOOD

DOUGLAS S. WOOD

Associate Director
Office of Legal Support Services
Criminal Division

EXHIBIT 3

**U.S. DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION**

April 29, 1983

Mr. Robert Schakne
CBS News
2020 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Schakne:

This is in reference to your February 3, 1978 Freedom of Information Act (FOIA) request pertaining to "William Medico (deceased), Phillip Medico, Charles Medico or Samuel Medico." The requested information pertaining to a deceased William Medico has been administratively released since June 14, 1978, or thereafter, consistent with the administrative decision of Quinlan J. Shea, Jr., then-Director, Office of Privacy and Information Appeals, Department of Justice.

Both a Phillip and Samuel Medico have died since the filing of your FOIA request. Consistent with the unique administrative release of documents pertaining to a deceased William Medico, the Drug Enforcement Administration (DEA) has administratively determined that any DEA records responsive to your FOIA request concerning a deceased Phillip and Samuel Medico may be released under these unique circumstances. A search of DEA records, however, has produced no documents responsive to your request concerning these two deceased individuals. If a rap sheet had been discovered during a search of DEA records pertaining to these deceased individuals, that record would have been referred to the Federal Bureau of Investigation (FBI) for direct response to you under the FOIA.

With respect to your FOIA request concerning a Charles Medico, it has been administratively determined that any financial crime information which might have been found in DEA records could have been disclosed in the public interest consistent with FOIA Exemptions 6 and 7(C), 5 USC and 552(b)(6) and (b)(7)(C). A search of DEA records, however, has produced no financial crime information concerning a Charles Medico. The Drug Enforcement Administration continues to maintain that it can neither confirm nor deny whether any other criminal information concerning a Charles Medico might be found in its records. Disclosure of any other criminal information concerning a Charles Medico would constitute either a clearly unwarranted or an unwarranted invasion of privacy. If a rap sheet(s) had been discovered during a search of DEA records concerning a Charles Medico, that record would have been referred to the FBI for direct response to you under the FOIA.

This will supplement the Drug Enforcement Administration's response to your FOIA request based on the above information which recently has come to the agency's attention.

Sincerely,

PAUL BROWN

PAUL BROWN

Chief

Freedom of Information

Section

Drug Enforcement

Administration

Department of Justice

cc: Kevin T. Baine, Esq.
G. David Fenstenheim,
Esq.
William & Connolly
839 17th Street, N.W.
Washington, D.C.
20006

EXHIBIT 4

**U.S. DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION**

April 29, 1983

Mr. Jack C. Landau, Director
The Reports Committee for
Freedom of the Press
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Landau:

This is in reference to your September 21, 1978 Freedom of Information Act (FOIA) request pertaining to "William Medico (deceased), Phillip Medico and Charles Medico, aka Samuel Medico." The requested information pertaining to a deceased William Medico has been administratively released since June 14, 1978, or thereafter, consistent with the administrative decision of Quinlan J. Shea, Jr., then-Director, Office of Privacy and Information Appeals, Department of Justice.

Both a Phillip and Samuel Medico have died since the filing of your FOIA request. Consistent with the unique administrative release of documents pertaining to a deceased William Medico, the Drug Enforcement Administration (DEA) has administratively determined that any DEA records responsive to your FOIA request concerning a deceased Phillip and Samuel Medico may be released under these unique circumstances. A search of DEA records, however, has produced no documents responsive to your request concerning these two deceased individuals. If a rap sheet had been discovered during a search of DEA records pertaining to these deceased individuals, that

record would have been referred to the Federal Bureau of Investigation (FBI) for direct response to you under the FOIA.

With respect to your FOIA request concerning a Charles Medico, it has been administratively determined that any financial crime information which might have been found in DEA records could have been disclosed in the public interest consistent with FOIA Exemptions 6 and 7(C), 5 USC and 552(b)(6) and (b)(7)(C). A search of DEA records, however, has produced no financial crime information concerning a Charles Medico. The Drug Enforcement Administration continues to maintain that it can neither confirm nor deny whether any other criminal information concerning a Charles Medico might be found in its records. Disclosure of any other criminal information concerning a Charles Medico would constitute either a clearly unwarranted or an unwarranted invasion of privacy. If a rap sheet(s) had been discovered during a search of DEA records concerning a Charles Medico, that record would have been referred to the FBI for direct response to you under the FOIA.

This will supplement the Drug Enforcement Administration's response to your FOIA request based on the above information which recently has come to the agency's attention.

Sincerely,

PAUL BROWN

PAUL BROWN

Chief

Freedom of Information
Section

Drug Enforcement
Administration

Department of Justice

cc: Kevin T. Baine, Esq.
G. David Fenstenheim,
Esq.
William & Connolly
839 17th Street, N.W.
Washington, D.C.
20006

EXHIBIT 5

**U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION**
Washington, D.C. 20535

Mr. Robert Schakne
CBS News
2020 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Schakne:

Reference is made to your February 3, 1978, Freedom of Information Act (FOIA) request pertaining to "William Medico (deceased), Phillip Medico, Charles Medico or Samuel Medico."

Information received by the Federal Bureau of Investigation (FBI) indicates that Phillip and Samuel Medico are now deceased. To be consistent with the administrative decision of Quinlan J. Shea, Jr., former Director, Office of Privacy and Information Appeals, Department of Justice, that requested information pertaining to then deceased William Medico be released, it has been administratively determined that any FBI records responsive to your FOIA request concerning Phillip and Samuel Medico be released.

Searches of the General Indices of the Central Records System at FBI Headquarters (FBIHQ) concerning any arrests, indictments, acquittals, convictions or sentences of Phillip and Samuel Medico were undertaken. Enclosed are the only records identifiable with your request concerning Phillip Medico. These documents have been processed by the FBI's Records Management Division, and portions of the information have been deleted to protect information

which is exempt from disclosure pursuant to Title 5, United States Code, Section 552 (b)(7)(D). This exemption is cited to protect the identity of a local law enforcement agency that provided the FBI with information. The information marked "Outside the Scope" has been deemed not pertinent to your request and, therefore, no specific FOIA exemption was cited. The FBI was unable to locate any record responsive to your request identifiable with Samuel Medico.

In regard to your FOIA request concerning a Charles Medico, any financial crime information which might be contained in the FBI Central Records System could be disclosed in the public interest. However, a search of the General Indices of the Central Records System at FBIHQ failed to locate any financial crime information concerning Charles Medico. It continues to be the position of the FBI that it cannot be stated on the public record whether a search of the Central Records System did or did not disclose any other criminal information as to Charles Medico. What can be stated, however, is that if such requested information did exist it would be exempt from disclosure pursuant to Title 5, United States Code, Section 552 (b)(6) and (b)(7)(C).

This letter supplements the FBI's response concerning your FOIA request pertaining to Phillip Medico, Charles Medico or Samuel Medico.

Sincerely yours,

JAMES K. HALL

James K. Hall, Chief
Freedom of Information –
Privacy Acts Section
Records Management Division
Enclosure

EXHIBIT 6

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Washington, D.C. 20535

Mr. Jack C. Landau, Director
The Reporters Committee for
Freedom of the Press
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Landau:

Reference is made to your September 21, 1978, Freedom of Information Act (FOIA) request pertaining to "William Medico (now deceased), Phillip Medico and Charles Medico, aka Samuel Medico."

Information received by the Federal Bureau of Investigation (FBI) indicates that Phillip and Samuel Medico are now deceased. To be consistent with the administrative decision of Quinlan J. Shea, Jr., former Director, Office of Privacy and Information Appeals, Department of Justice, that requested information pertaining to then deceased William Medico be released, it has been administratively determined that any FBI records responsive to your FOIA request concerning Phillip and Samuel Medico be released.

Searches of the General Indices of the Central Records System at FBI Headquarters (FBIHQ) concerning any arrests, indictments, acquittals, convictions or sentences of Phillip and Samuel Medico were undertaken. Enclosed are the only records identifiable with your request concerning Phillip Medico. These documents have been processed by the FBI's Records Management Division, and portions of

the information have been deleted to protect information which is exempt from disclosure pursuant to Title 5, United States Code, Section 552 (b)(7)(D). This exemption is cited to protect the identity of a local law enforcement agency that provided the FBI with information. The information marked "Outside the Scope" has been deemed not pertinent to your request and, therefore, no specific FOIA exemption was cited. The FBI was unable to locate any record responsive to your request identifiable with Samuel Medico.

In regard to your FOIA request concerning a Charles Medico, any financial crime information which might be contained in the FBI Central Records System could be disclosed in the public interest. However, a search of the General Indices of the Central Records System at FBIHQ failed to locate any financial crime information concerning Charles Medico. It continues to be the position of the FBI that it cannot be stated on the public record whether a search of the Central Records System did or did not disclose any other criminal information as to Charles Medico. What can be stated, however, is that if such requested information did exist it would be exempt from disclosure pursuant to Title 5, United States Code, Section 552 (b)(6) and (b)(7)(C).

This letter supplements the FBI's response concerning your FOIA request pertaining to Phillip Medico, Charles Medico or Samuel Medico.

Sincerely yours,

JAMES K. HALL

James K. Hall, Chief
Freedom of Information –
Privacy Acts Section
Records Management Division

Enclosure

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] outside THE SCOPE [REDACTED]

[REDACTED] b7d

[REDACTED] PHILLIP MELICO, 137 Elizabeth Street, Pittston, Pa., was arrested on September 2, 1930, for violation of City Ordinance. [REDACTED] b7d

[REDACTED] No disposition or other information concerning the city ordinance violated was set forth in the records. Disposition was listed as "fined \$100 by Mayor LANGAN." [REDACTED] b7d

[REDACTED] On September 2, 1930, PHILLIP MELICO, 137 Elizabeth Street, Pittston, Pa., was arrested [REDACTED] b7d

[REDACTED] for transporting intoxicants, liquor. On September 3, 1930, he was found guilty and fined \$100. [REDACTED] b7d

[REDACTED] outside THE SCOPE [REDACTED]

100-1261

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] outside THE SCOPE [REDACTED]

[REDACTED] b7d

[REDACTED] PHILLIP MELICO, 137 Elizabeth Street, Pittston, Pa., was arrested on September 2, 1930, for violation of City Ordinance. [REDACTED] b7d

[REDACTED] No disposition or other information concerning the city ordinance violated was set forth in the records. Disposition was listed as "fined \$100 by Mayor LANGAN." [REDACTED] b7d

[REDACTED] On September 2, 1930, PHILLIP MELICO, 137 Elizabeth Street, Pittston, Pa., was arrested [REDACTED] b7d

[REDACTED] for transporting intoxicants, liquor. On September 3, 1930, he was found guilty and fined \$100.00. [REDACTED] b7d

[REDACTED] outside THE SCOPE [REDACTED]

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File No. 62

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EXHIBIT 7

**U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535**

April 29, 1983

Mr. Robert Schakne
CBS News
2020 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Schakne:

Reference is made to your February 3, 1978, Freedom of Information Act (FOIA) request pertaining to "William Medico (now deceased), Phillip Medico, Charles Medico or Samuel Medico."

Information received by the Federal Bureau of Investigation (FBI) indicates that Phillip and Samuel Medico are now deceased. To be consistent with the administrative decision of Quinlan J. Shea, Jr., former Director, Office of Privacy and Information Appeals, Department of Justice, that requested information pertaining to then deceased William Medico be released, it has been administratively determined that any FBI identification records responsive to your FOIA request concerning Phillip and Samuel Medico be released.

Searches of the FBI Identification Division's Criminal File failed to disclose any identification records identifiable with Phillip Medico or Samuel Medico.

It continues to be the position of the FBI that it cannot be stated on the public record whether a search of the Identification Division Records System did or did not

disclose a record containing the information you requested as to Charles Medico. It can only be stated that, if such a record exists, it would be exempt from disclosure pursuant to Title 5, U.S.C., Section 552(b)(3), (b)(6) and (b)(7)(C).

Sincerely yours,

MELVIN D. MERCER, JR.

Melvin D. Mercer, Jr., Chief
Recording Section
Identification Division

Kevin T. Baine, Esq.
G. David Fensterheim, Esq.
Williams & Connolly
839 17th Street, N.W.
Washington, D.C. 20006

EXHIBIT 8

**U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535**

April 29, 1983

Mr. Jack Landau, Director
The Reporters Committee for
Freedom of the Press
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Landau:

Reference is made to your September 21, 1978, Freedom of Information Act (FOIA) request pertaining to "William Medico (now deceased), Phillip Medico and Charles Medico, aka Samuel Medico."

Information received by the Federal Bureau of Investigation (FBI) indicates that Phillip and Samuel Medico are now deceased. To be consistent with the administrative decision of Quinlan J. Shea, Jr., former Director, Office of Privacy and Information Appeals, Department of Justice, that requested information pertaining to then deceased William Medico be released, it has been administratively determined that any FBI identification records responsive to your FOIA request concerning Phillip and Samuel Medico be released.

Searches of the FBI Identification Division's Criminal File failed to disclose any identification records identifiable with Phillip Medico or Samuel Medico.

It continues to be the position of the FBI that it cannot be stated on the public record whether a search of the

Identification Division Records System did or did not disclose a record containing the information you requested as to Charles Medico. It can only be stated that, if such a record exists, it would be exempt from disclosure pursuant to Title 5, U.S.C., Section 552(b)(3), (b)(6) and (b)(7)(C).

Sincerely yours,

MELVIN D. MERCER, JR.

Melvin D. Mercer, Jr., Chief
Recording Section
Identification Division

Kevin T. Baine, Esq.
G. David Fensterheim, Esq.
Williams & Connolly
839 17th Street, N.W.
Washington, D.C. 20006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR THE
FREEDOM OF THE PRESS, ET AL., PLAINTIFFS,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS.

Hon. JOHN GARRETT PENN

AFFIDAVIT OF ROBERT SCHAKNE

I, Robert Schakne, have and been duly sworn, do hereby depose, under penalty of perjury, as follows:

1. I am a news correspondent employed by CBS News, a division of CBS, Inc., and I am a plaintiff in this action.
2. I make this affidavit in support of plaintiffs' motion for summary judgment filed herein.

3. On several occasions in 1978 and 1979, including meetings and/or conversations on February 3, 1978, July 6, 1978, July 31, 1978, and May 3, 1979, I spoke with the following officials of the Department of Justice concerning the Freedom of Information Act request which is the subject of this lawsuit: Robert Stevenson, Mary Lawton, Jim Jardine, Terrence Adamson, and Robert Havel. On these occasions I made clear that I sought the information which is the subject of my request in connection with my investigation of the then public allegations of corruption involving Congressman Daniel Flood. Specifically, I am certain that I pointed out that I sought the information because I had learned that Medico Industries, an organization identified in the Pennsylvania

Crime Commission report as "dominated by organized crime" had received millions of dollars in federal funds for Defense Department contracts and that Congressman Flood had been instrumental in arranging these contracts. On several occasions, I personally argued to these officials that this strong public interest must be weighed against whatever minimal privacy interest might exist in already public information.

Robert Schakne

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR THE
FREEDOM OF THE PRESS, ET AL., PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS.

Hon. JOHN GARRETT PENN

**NOTICE OF COMPLIANCE WITH COURT'S ORAL REQUEST
AND FILING OF IN CAMERA DECLARATION**

On May 3, 1985, the Court requested an in camera review of any documents pertaining to a Charles Medico that defendants have withheld. While defendants maintain that they can neither confirm nor deny the existence of any rap sheet or non-financial criminal history records pertaining to a Charles Medico, to the extent that any such documents exist, they have been supplied to the Court in compliance with the Court's oral request. Defendants have

also submitted the In Camera Declaration of Special Agent David Cook.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General
JOSEPH E. diGENOVA
United States Attorney

BARBARA L. GORDON

BARBARA L. GORDON

ROBERT S. LAVET

ROBERT S. LAVET
Attorneys, Department of Justice
Civil Division, Room 3712
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Tele: (202) 633-1275

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3308

THE REPORTERS COMMITTEE FOR THE
FREEDOM OF THE PRESS, ET AL., PLAINTIFF,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
DEFENDANTS.

Hon. JOHN GARRETT PENN

Filed August 20, 1985

**NOTICE OF COMPLIANCE WITH COURT'S REQUEST
AND FILING OF IN CAMERA DECLARATION**

In its memorandum decision dated August 5, 1985, the Court required defendants to file a statement, *in camera*, with the Court in response to plaintiff's request for information concerning Charles Medico. Defendants have complied with the Court's directive by filing the *In Camera*

Declaration of Special Agent David Cook, dated August 15, 1985.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General
JOSEPH E. diGENOVA
United States Attorney

BARBARA L. GORDON

BARBARA L. GORDON

ROBERT S. LAVET

ROBERT S. LAVET
Attorneys, Department of Justice
Civil Division, Room 3712
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Tele: (202) 633-1275

In the Supreme Court of the United States

No. 87-1379

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

ORDER ALLOWING CERTIORARI. Filed April 18, 1988.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

FILED

JUN 17 1988

JOSEPH P. SPANOL, JR.
CLERK

No. 87-1379

In the Supreme Court of the United States
OCTOBER TERM, 1987

**UNITED STATES DEPARTMENT OF JUSTICE,
ET AL., PETITIONERS**

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

ROY T. ENGLERT, JR.
Assistant to the Solicitor General

LEONARD SCHAITMAN

JOHN F. DALY
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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QUESTIONS PRESENTED

1. Whether, in applying the invasion-of-privacy exemptions of the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), to a request for an individual's criminal (or other) records that are compiled by the federal government in large national data banks, a district court may conclude that the individual has a substantial privacy interest in the compiled information even though the same raw data may be "matters of public record" in local government offices.
2. Whether, in applying Exemptions 6 and 7(C), a court should make an assessment of the weight of the "public interest" in the disclosure of the particular information sought, or should instead weigh in the balance only a uniform "public interest" in the disclosure of all information in the possession of the government.

PARTIES TO THE PROCEEDING

The petitioners are the United States Department of Justice, the Federal Bureau of Investigation (FBI), Attorney General Edwin Meese III, and FBI Director William S. Sessions.

The respondents are The Reporters Committee for Freedom of the Press and Robert Schakne, a CBS News correspondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1379

UNITED STATES DEPARTMENT OF JUSTICE,
ET AL., PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**BRIEF FOR THE PETITIONERS****OPINIONS BELOW**

The initial opinion of the court of appeals panel (Pet. App. 1a-34a) is reported at 816 F.2d 730. The majority and dissenting opinions of the court of appeals panel on denial of rehearing (Pet. App. 35a-49a) are reported at 831 F.2d 1124. The order denying rehearing en banc and the statement of four judges dissenting from that order (Pet. App. 64a-66a) are unreported. The memorandum of the district court (Pet. App. 52a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-61a) was entered on April 10, 1987. A petition for rehearing was denied on October 23, 1987 (Pet. App. 62a-63a). On January 14, 1988, Chief Justice Rehnquist

extended the time for filing a petition for a writ of certiorari to and including February 20, 1988. The petition was filed on February 16, 1988, and was granted on April 18, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

(B) On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are —

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; [or]

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy
* * *.

STATEMENT

This case arises from two 1978 requests under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552. CBS News reporter Robert Schakne and The Reporters Committee for Freedom of the Press filed requests with the Department of Justice for information on the criminal records of William, Phillip, Charles, and Samuel Medico. The requests sought "information about any prison sentences served in federal prisons, any convictions in federal courts, any indictments by federal grand juries or any arrests by federal law enforcement authorities," as well as "information known to the Department of Justice" concerning similar state and local matters (J.A. 38; see also J.A. 53-54).

1. The principal source of such criminal history information would be the files of the FBI's Identification Division. Pursuant to the statutory authority of 28 U.S.C. 534, the Identification Division was established in 1924 to serve as a national clearinghouse of identification records for law enforcement purposes (J.A. 61). The Division catalogs fingerprint cards submitted by criminal justice agencies in conjunction with arrests and incarcerations, as well as fingerprints submitted for other purposes (J.A. 62). For

each individual for whom criminal justice information is submitted, the Division compiles an identification record, or "rap sheet" (J.A. 63). The FBI maintains such rap sheets on more than 24 million persons.

Rap sheets reflect information regarding arrests, convictions and other dispositions when known, and incarcerations (J.A. 63). The criminal information that makes up the rap sheet is supplied voluntarily by a variety of federal, state, and local agencies; the Division itself does not originate any such data (*ibid.*). In many (though not all) instances, the contributing agency is a state law enforcement agency that itself compiles criminal history information from local originating sources—*e.g.*, local police departments and county court systems. If an agency that submits an arrest record later provides the FBI with dispositional information (*e.g.*, conviction, dismissal), that information is included on the rap sheet. In many instances, however, such information is never received, and the rap sheet will continue to reflect only the arrest. The Division removes entries from a rap sheet when a contributing agency asks it to do so, but an arrest or conviction record that has been expunged at the state and local levels may continue to appear on the rap sheet unless the FBI is advised that the record should be updated. Apart from the Identification Division's rap sheet files, other FBI and Justice Department files may also contain similar criminal history information collected in the course of federal criminal investigations (see J.A. 86-88).

The paramount purpose for which rap sheets are maintained is to assist law enforcement officials in the detection and prosecution of crimes and to furnish information to the courts and corrections officials for use in making decisions regarding sentencing, parole, and similar matters (J.A. 63). Because the Department of Justice recognizes

the adverse effects that dissemination of criminal history information may have on the subjects, the Department has adopted policies to limit the dissemination of such information (see 28 C.F.R. 20.30-20.38; see also 28 C.F.R. 50.2). Apart from dissemination for law enforcement purposes and dissemination to other federal agencies for internal use, rap sheet information is released only to certain recipients specifically authorized by federal statute to obtain such information for employment and licensing purposes, including state and local governments, certain banking institutions, and institutions in the securities and commodities trading industries (J.A. 64-65). Those recipients, however, cannot receive rap sheet information on the basis of a "name check" of the subject, but only on submission of positive identification, in the form of a fingerprint card (J.A. 65). Moreover, in releasing rap sheet information to banks or state or local government entities, the FBI deletes entries of arrests more than one year old if no disposition is shown (J.A. 66; 28 C.F.R. 20.33(a)(3)). In addition to these policies regarding criminal history files as such, more general Justice Department regulations, which are intended to "strik[e] a fair balance between the protection of individuals * * * and public understandings of the problems of controlling crime and administering government," generally preclude the release of a criminal defendant's prior record (28 C.F.R. 50.2(a)(2) and (b)(4)).¹

¹ These policies were premised, in part, on the belief that rap sheets were wholly exempt from FOIA disclosure, pursuant to 28 U.S.C. 534 and Exemption 3 of FOIA, 5 U.S.C. 552(b)(3). The court below rejected our Exemption 3 argument, and we did not seek review of that holding in this Court. It must thus be assumed, for present purposes, that these policies yield to FOIA's general disclosure mandate to the extent that FOIA Exemptions 6 and 7(C) do not support non-disclosure.

2. The Justice Department denied respondents' requests on two grounds: (1) that under 28 U.S.C. 534 and FOIA Exemption 3, 5 U.S.C. 552(b)(3), all rap sheet information is exempt from disclosure; and (2) that under FOIA Exemptions 6 and 7(C), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), disclosure of the information sought, whether contained in rap sheets or not, would constitute an unwarranted (indeed, "clearly unwarranted") invasion of the subjects' privacy (J.A. 48-50, 59-60).

Respondents filed the present action in December 1979. The complaint, unlike the actual FOIA requests that preceded it, declared that "[t]he information sought is limited to matters of public record" (J.A. 33). The scope of the controversy was further narrowed in two respects during the course of the district court proceedings. First, the Department released information regarding all of the subjects except Charles Medico because they had died, and, in the judgment of the Department, there was therefore no longer any substantial privacy interest to be protected (J.A. 108-127). Second, with respect to the remaining subject, Charles Medico, the Department disclosed that it had not withheld any non-rap-sheet records of "financial" crimes.

The latter disclosure was made in an effort to avoid litigation over a nonissue—the withholding of financial crime information on unwarranted-invasion-of-privacy grounds—and in response to litigation papers in which respondents, for the first time, specified an interest in such crimes. In their summary judgment papers, respondents indicated that their inquiry was directed at uncovering evidence of illegal dealings between the Medicos and Representative Daniel Flood, who had reportedly been involved in arranging for federal contracts for a business operated by the Medicos (J.A. 96-97). Respondents fur-

ther suggested that the significance of the information sought would depend on the "type of criminal record" involved, and they cited information regarding "a record of bribery, embezzlement, or other financial crime" as information that "would potentially be a matter of great public interest" (J.A. 97). Because the Department agreed that such a record would be of public interest, the Department formally made it clear that, other than rap sheet information for which it was still claiming Exemption 3 (see note 36, *infra*), there were no records of the sort of "financial crime[s]" mentioned by plaintiffs regarding Charles Medico (J.A. 116-117). The government continued to refuse to release—or to confirm or deny the existence of—a rap sheet for Charles Medico or any other records of nonfinancial crimes (or alleged crimes) resulting in his arrest, indictment, conviction, acquittal, or sentence. Although the government had hoped that this disclosure might satisfy respondents (see J.A. 105-106 nn.3 & 4), respondents persisted in seeking *all* records of arrests (etc.) of Charles Medico, no matter what the alleged crime.

The district court granted summary judgment to the government in August 1985 (Pet. App. 52a-58a). The court first ruled that 28 U.S.C. 534 qualified as a withholding statute under FOIA Exemption 3 and barred the release of rap sheet information (Pet. App. 54a-56a). The court then held that rap sheet information, as well as any similar information that might exist in other Department files, was exempt from disclosure under FOIA Exemptions 6 and 7(C), since the release of such information would constitute an invasion of privacy that was not warranted by any public interest in disclosure (Pet. App. 56a-58a). The court based that conclusion on its own assessment of the privacy and public interest concerns implicated in the circumstances of this case. In making that

assessment, the court took into account the Department's in camera submission of any and all responsive information that had been withheld (*id.* at 57a-58a & n.2, 59a; see also J.A. 130-133).

3. The court of appeals reversed. In the initial panel opinion, the court first held that 28 U.S.C. 534 did not qualify as a withholding statute under FOIA Exemption 3 and that rap sheets cannot be withheld on that basis (Pet. App. 6a-13a). The court went on to rule that the district court had erred as a matter of law in its application of Exemptions 6. and 7(C) (*id.* at 14a-26a). The court acknowledged that those exemptions call for a balancing of the privacy interests at stake against the public interest in disclosure, but it found reversible error in the district court's method of striking that balance.

With regard to the privacy side of the balance, the court opined that the routine public availability of a record at the local level—such as a conviction record in a county courthouse or an arrest record on a local police blotter—sharply attenuates any privacy interest in such information, even when it is compiled in a large, national data bank (Pet. App. 18a-21a). The court dismissed the government's argument that individuals have a protectible interest under FOIA in maintaining the obscurity of such records, declaring the argument "attractive as a legislative policy matter" but unrelated to the statutory term "privacy" (*id.* at 18a-19a). On the public interest side, the court began by noting the "awkwardness of * * * appraising the public interest in the release of government records" (*id.* at 21a), and sought "objective indications of the public interest" (*id.* at 23a). It found such indications in the policy determinations of state and local bodies to maintain public access to the underlying records, and it held that the district court should have deferred to those

determinations in assessing the "public interest" for purposes of the FOIA balancing test (*id.* at 22a & n.13). The court remanded for further proceedings under that standard.

Judge Starr concurred in the result but expressed serious reservations about the test announced by the panel majority (Pet. App. 27a-34a). He disagreed sharply with the majority's approach to the "public interest" side of the balancing test. While sharing to a degree the majority's discomfort with the "value-laden judgment calls" required under the balancing test, Judge Starr acknowledged that such balancing is what Congress requires under these exemptions, and he chided the majority for "go[ing] AWOL" by declining to perform that task (*id.* at 30a).

4. The government sought rehearing on the Exemption 6 and 7(C) issues. Our rehearing petition was supported by an amicus curiae submission by SEARCH Group Inc., an organization of state and local law enforcement officials, as well as agencies of the States of New York and California. Those amici sought, among other things, to bring to the court of appeals' attention the complexity of state and local provisions regarding the disclosure of arrest and conviction records. In particular, amici noted that most States—which often are the direct source of data provided to the FBI for inclusion in rap sheets—treat compilations of such data as confidential at the state level even though the underlying information remains a "public record" locally. See, e.g., N.Y. Exec. Law § 837 (McKinney 1982); Cal. Penal Code § 11077 (West 1982). Amici further noted that the panel opinion could have extremely adverse consequences for the sharing of information by law enforcement agencies, by inducing some States to decline to provide information to the FBI in order to prevent state-compiled information from becoming widely available by means of FOIA requests.

The court of appeals denied rehearing. The panel majority, however, altered its rationale, and Judge Starr voted to grant rehearing and affirm the district court's grant of summary judgment to the government (Pet. App. 35a-49a). The majority analyzed anew the public interest side of the balancing test, abandoning its earlier reliance on state and local policy determinations as guides for the assessment of the public interest in disclosure, but declining to articulate any alternative means of making such assessments (*id.* at 36a-40a). On the contrary, the panel indicated its view that the judiciary "cannot" in any principled way make such assessments with respect to particular government records (*id.* at 38a). The panel therefore held that the only "public interest" to be considered in Exemption 6 and 7(C) cases is the general disclosure policy inherent in FOIA, without any distinction based on the nature of the information sought. The panel held that the court must "balance" that static interest against any privacy interests cognizable in particular instances (*id.* at 40a).

With respect to the privacy side of the balancing test, the panel majority adhered to its view that there can be little if any privacy interest in information that is a matter of "public record" at any level (Pet. App. 40a-42a). It clarified its prior opinion, however, by stating that the relevant inquiry is a "factual" one and not a matter of deference to state and local policy determinations (*id.* at 41a-42a).

Judge Starr, in dissent, "confess[ed] that [he] was wrong the first time around" (Pet. App. 48a) and now vigorously disputed the panel's Exemption 7(C) analysis in its entirety. Judge Starr reiterated that the majority "fail[ed] to carry out its obligation" under the statute to make an evaluation of the public interest in disclosure of particular

information (*id.* at 44a). In response to the majority's suggestion that it is impossible for judges to assess the public interest in particular information, he pointed out that such distinctions are drawn in other areas of the law (such as defamation of public figures), which might provide useful analogies for undertaking this task (*id.* at 45a-46a).

Judge Starr also emphasized the distinct privacy concerns presented by "computerized data banks of the sort involved here," noting that both Congress and a "host" of States have recognized those concerns (Pet. App. 44a). He stated that the panel's ruling would "have a pernicious effect on personal privacy interests in conflict with Congress' express will," citing other types of federal data compilations containing information that is "highly personal" yet may be a "public record" at some level (*id.* at 48a-49a). He further noted the potentially "crippling" administrative burdens the panel's ruling could impose, both by requiring federal agencies to ascertain the "public record" status of information received from outside sources and by transforming the federal government "in one fell swoop into *the clearinghouse for highly personal information*" of various sorts (*id.* at 46a-48a). Judge Starr said, "We should abandon right now our unfortunate departure from traditional FOIA analysis; having repented, we should then conduct an old-fashioned Exemption 7(C) balancing" (*id.* at 49a). Conducting that balancing, Judge Starr concluded that he would affirm the district court's determination that the privacy interests in this case outweighed the "limited public interest" in disclosure (*ibid.*).

Several weeks later, the court of appeals denied the government's suggestion of rehearing en banc (Pet. App. 64a-66a). Four dissenting judges characterized the panel's decision as "profoundly wrong," stating that "[o]pening

up the vast storehouse of computerized criminal histories to FOIA requests, regardless of how remote and negligible the public interest in such sensitive documents may be, is unfortunate and misconceived" (*id.* at 66a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has provided a broad right of public access to government records through FOIA, but it has consistently taken care "to protect certain equally important rights of privacy." S. Rep. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 38 (1974) [hereinafter *FOIA Source Book*]. To do so, it has enacted two exemptions to FOIA's coverage. Exemption 6 (5 U.S.C. 552(b)(6)), broadly applicable to files relating to individuals, exempts material "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C) (5 U.S.C. (Supp. IV) 552(b)(7)(C)), applicable to "records or information compiled for law enforcement purposes," provides somewhat broader protection, exempting materials the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."²

Under either of those exemptions,³ it is undisputed that the word "unwarranted" calls for "the balancing of private

² The quoted language is from Exemption 7(C) as amended by the Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Subtit. N, § 1802(a), 100 Stat. 3207-48. As the court of appeals acknowledged (Pet. App. 14a), Section 1804(a) of that Act, 100 Stat. 3207-50, expressly made those amendments applicable to pending cases, such as the present one (see 5 U.S.C. (Supp. IV) 552 note).

³ As the district court and Judge Starr determined (Pet. App. 28a, 56a), and as the court of appeals majority assumed (*id.* at 14a-15a),

against public interests." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982); see *Department of the Air Force v. Rose*, 425 U.S. 352, 373 (1976); S. Rep. 813, *supra*, at 9, *FOIA Source Book* 44. Nor can there by any doubt that Congress wanted the judiciary to perform that balancing task, reviewing such agency determinations de novo (5 U.S.C. 552(a)(4)(B)).

The court of appeals sought to *avoid* the balancing of interests mandated by Congress by announcing unprecedented new approaches that transform both sides of the balancing test into mechanical rules that avoid any genuine weighing of interests. The court of appeals' analysis flouts the intent of Congress that courts engage in meaningful balancing, and it demeans the legitimate privacy interests of millions of persons.

1. The court of appeals adopted an improperly restrictive and mechanistic approach to the "privacy" side of the

the present case is governed by Exemption 7(C). Congress amended the Exemption 7 threshold requirements in 1986 to encompass broadly all "records or information compiled for law enforcement purposes." Congress's avowed purpose was to eliminate any "formalistic test" regarding "investigatory records" (132 Cong. Rec. S14039 (daily ed. Sept. 27, 1986) (remarks of Sen. Hatch)). There can be no doubt that any records responsive to respondents' requests would be "compiled for law enforcement purposes." In this brief, we nevertheless treat Exemptions 6 and 7(C) together for the most part, both because the court of appeals made clear that its novel analysis was to be applied under both provisions and because the analysis under the two provisions, despite their distinct standards (see *FBI v. Abramson*, 456 U.S. 615, 629-630 n.13 (1982)), is analogous in its general approach. As noted below, however, the applicability of Exemption 7(C) here makes certain aspects of the court of appeals' decision—which would impose enormous burdens on law enforcement agencies—particularly troubling.

balancing test. The court of appeals purported to rely on the “plain language” of the term “personal privacy” as a reason for ignoring the individual’s interest in maintaining the obscurity of “public” but widely dispersed records, but the statutory phrase encompasses that interest. The very essence of “privacy” is the individual’s ability to control the dissemination of information about him. In both common parlance and legal thinking the term “privacy” has a much broader plain meaning than the court of appeals gave it.

The legislative background of FOIA indicates that Congress itself took a broad view of the concept of privacy, and specifically that it understood that “privacy” encompasses the concerns that are raised by government compilations of dispersed personal data. The history of the original FOIA, which included Exemption 6, reflects Congress’s determination to afford an open-ended exemption to protect privacy interests, which Congress regarded as important. And although the actual legislative history of the 1974 amendments that added Exemption 7(C) is sparse, the subject of an individual’s “privacy” interest in the obscurity of records had been the focus of substantial attention in the early 1970s by law enforcement officials, the courts, and congressional committees.

The court of appeals’ analysis improperly turns the assessment of “privacy” interests under Exemptions 6 and 7(C) into a virtual *per se* rule requiring disclosure of records that are theoretically available to the public anywhere in the nation, contrary to the admonitions of Congress and this Court that the courts should engage in a meaningful, pragmatic balancing of interests. That lesson is particularly clear from this Court’s decision in *United States Dep’t of State v. Washington Post Co., supra*, in which the Court rejected another mechanical, *per se* rule

and also specifically addressed the issue of “public records,” noting that “the fact that [information] is a matter of public record somewhere in the Nation cannot be decisive” (456 U.S. at 603 n.5).

The assessment of the privacy interest with respect to a particular criminal history record, whether or not it is “public” somewhere, is a matter of judgment and common sense. A starting point for this assessment should be the well-recognized adverse effects that the dissemination of criminal history records, particularly arrest records unaccompanied by information as to disposition, has on the individual subject. Other factors, such as the age and location of the record and the character of the offense charged, also affect the weight to be given to the subject’s privacy interest.

In addition to the errors noted above, the court of appeals erred by making its entire privacy analysis turn on a factual question – whether the underlying information is a “public record” at the local level – whose answer is often not known to the FBI when it receives a FOIA request. In cases of uncertainty about a record’s “public” status at the local level, the court of appeals read into FOIA a requirement that the FBI make specific inquiries of the local agency at the time of the request. No statute gave the court authority to impose that burdensome requirement, nor is it an appropriate requirement.

2. The court of appeals made an even more radical departure from settled law with respect to the “public interest” side of the balancing test. Asserting that there is no principled way in which a court may assess the public interest in the release of particular information, the court held that it would consider, on this side of the balance, a static “public interest,” based on the disclosure policies of FOIA, in the release of *any* information, without any distinction based on the nature of the information sought.

That approach is fundamentally at odds with the balancing test required by Congress. It would lead to irrational results by precluding the courts from making any distinctions whatever between information concerning matters of vital public concern and information concerning “one’s otherwise inconspicuously anonymous next-door neighbor” (Pet. App. 45a (Starr, J., dissenting)). The judiciary can and does draw such distinctions in other areas of law, including other aspects of FOIA itself.

There is no reason why a genuine assessment of the “public interest” need be the standardless, “idiosyncratic” inquiry that the court of appeals feared. The policies of FOIA itself suggest a structure for this analysis, under which the weight of the “public interest” depends on the extent to which release of the information in question would advance FOIA’s core purposes – *i.e.*, “ensur[ing] an informed citizenry, vital to the functioning of a democratic society.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

3. The district court properly balanced the privacy interest and the public interest in this case. The connection between Charles Medico and a former public official might give rise to a significant public interest in certain types of criminal records if they existed, but it does not give rise to a significant public interest in all such records regardless of their characteristics, nor does it make Mr. Medico’s substantial privacy interest unworthy of consideration. The district court and the dissenting member of the court of appeals panel examined the Department’s *in camera* submissions (which included any actual records) and agreed with the government that the privacy interests involved outweighed any public interest in disclosure that exists on the facts of this case. We submit that this conclusion, reached by the only judges who were willing to make

the correct inquiry, was plainly right and that this Court should direct the court of appeals to affirm the district court’s judgment.

ARGUMENT

I. EXEMPTIONS 6 AND 7(C) REQUIRE A REALISTIC PRACTICAL ASSESSMENT OF PRIVACY INTERESTS, INCLUDING PRIVACY INTERESTS IN “PUBLIC RECORDS”

The first major error in the court of appeals’ analysis was its restrictive and mechanical approach to the assessment of the subject’s “privacy” interest in FBI rap sheets. The court’s reasoning, which in this respect is closely tracked in the arguments of respondents (see Br. in Opp. 6-8), was that matters such as records of arrests and convictions, if “publicly” available at any level, are inherently so devoid of a “private” nature that they are necessarily beyond the scope of Congress’s concern in enacting the FOIA privacy exemptions (Pet. App. 17a-18a). While stopping just short of a *per se* rule that there is *no* privacy interest in any “public record” the court virtually assured that result in most cases by concluding that “any privacy interest” in such records “seems insignificant” (*id.* at 20a). As noted by the dissenting judge below, such a rule would have a broad “pernicious effect on personal privacy interests,” opening up a wide array of personal data to virtually automatic disclosure⁴ and transforming the federal

⁴ As Judge Starr pointed out (Pet. App. 48a), relying on statements in our petition for rehearing, numerous federal agencies amass information on individuals from widely dispersed “public record” sources:

Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Ur-

government “in one fell swoop into *the clearinghouse for highly personal information*” (*id.* at 48a).

The court of appeals’ holdings regarding the privacy side of the balance fail in several respects to carry out the expressed intent of Congress that “personal privacy” be protected from unwarranted invasions. First, the court’s restrictive view of the term “privacy” ignores the breadth and complexity of that concept as it has been understood by Congress, the courts, and legal commentators, as well as the practical differences between information contained in dispersed, obscure local records and information contained in a centralized national data bank accessible by individual names. Second, the court’s talismanic reliance on the “public record” status of information at any local level is at odds with this Court’s repeated warnings that FOIA privacy determinations must be based on the careful, practical assessment of interests in particular cases, rather than mechanical rules. Finally, by shifting the analysis from a practical assessment of the overall consequences of disclosure to a single fact that is often not known to the FBI, the court of appeals’ ruling fails to provide a workable standard for agency action and imposes burdens beyond those contemplated by FOIA.

A. The Statutory Term “Personal Privacy” Encompasses A Broad Range Of Privacy Concerns, Including The Dissemination Of Obscure But “Public” Records

The critical statutory language, used in both Exemption 6 and Exemption 7(C), is the simple term “personal privacy.” The court of appeals observed that “[w]hat is encompassed by the ‘personal privacy’ language of FOIA is, of course, a question of legislative intent, but there is no

ban Development maintains data on millions of home mortgages that are presumably “public records” at county clerks’ offices.

suggestion in the legislative history of Exemption 7(C) that ‘privacy’ has other than its ordinary meaning” (Pet. App. 16a-17a). It was the court of appeals, however, that failed to give the term “privacy” its ordinary meaning, using instead an approach that is far more restrictive than ordinary usage and that fails to address the range of “privacy” considerations on which Congress itself has focused.

1. A pivotal issue that divides the parties, and that divided the court below, is whether the term “privacy” encompasses the interest a person has in restricting dissemination of information about himself that, although theoretically “public” in the sense that it is available to one who knows exactly where to look, is in fact little known and difficult to locate. The difference between such information, and information that is “public” in the sense of being common knowledge, could hardly be starker than in the situation at hand. The FBI’s rap sheet files collect millions of items of information, from thousands of sources, and make them readily accessible by the subject’s name (among other means). If those files did not exist, or were inaccessible, the only way of obtaining information of the sort respondents have sought would be to search through thousands of county courthouses and local police blotters, many of which are not even alphabetically indexed. From the point of view of the individual who is the subject of a rap sheet—the individual whose “privacy” the statute protects—the practical difference between public access to dispersed raw data and public access to the FBI’s centralized files is enormous.

The court of appeals did not deny this. Yet it found the legislative phrase “unwarranted invasion of personal privacy” too narrow to afford any significant protection to this genuine interest. See Pet. App. 19a. Contrary to that

cramped view, however, one of the most fundamental aspects of the term "privacy," both in general use and as understood by Congress, involves control over obscure information.

In common parlance, "privacy" is not limited to those matters concerning an individual that are officially confidential. The term "privacy" is defined as "the quality or state of being apart from the company or observation of others." *Webster's Third New International Dictionary* 1804 (1981). Thus, contrary to the "plain language" argument advanced by the court of appeals (Pet. App. 16a-18a), neither the statute itself nor the Senate report's reference to "private affairs" supports the notion that all privacy interest is sapped out of a piece of information if there is any local government or agency that does not treat it as confidential.

In legal terminology, "privacy" has been applied to a wide range of interests protected by tort law and the Constitution. See generally W.P. Keeton, *Prosser and Keeton on The Law of Torts* 849-869 (5th ed. 1984); *Carey v. Population Services International*, 431 U.S. 678, 688-689 (1977). In searching for a unifying definition of all that is encompassed by the concept of privacy, commentators have repeatedly emphasized the control over information concerning the individual:

Privacy is the claim of individuals * * * to determine for themselves when, how, and to what extent information about them is communicated to others.

A. Westin, *Privacy and Freedom* 7 (1967).

Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others * * *. It is also the individual's right to control dissemination of information about himself * * *.

A. Breckenridge, *The Right to Privacy* 1 (1970). Perhaps the oldest and most eloquent legal definition of "privacy" is also the broadest: "the right to be let alone." W.P. Keeton, *supra*, at 849 (quoting T. Cooley, *A Treatise on the Law of Torts* 29 (2d ed. 1888)); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Specifically, one of the major strains of tort law in the privacy area concerns the public disclosure of information that, although true and known to some persons, is offensive to the subject when widely disseminated (see W.P. Keeton, *supra*, at 856-859). The application of such law to "public records" has engendered considerable controversy, but at least some writers have opined that "merely because [a fact] can be found in a public record, [it] does not [follow] that it should receive widespread publicity if it does not involve a matter of public concern" (*id.* at 859).

The precise resolution of that question as a matter of tort law, however, is unimportant to the case at hand.⁵

⁵ The specific tort-law controversy over dissemination of public records was effectively mooted by this Court's ruling in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), in which the Court held that the First Amendment barred any legal prohibition on the truthful reporting of information obtained from public records. The rationale of *Cox Broadcasting*, however, was not—as the court of appeals seemed to think (Pet. App. 20a)—that the public availability of information somehow renders any remaining privacy interest in that information insignificant. Rather, this Court recognized that it was dealing with a "sphere of collision between claims of privacy and those of the free press," with legitimate interests to be considered on both sides (420 U.S. at 491). Moreover, with respect to the specific question of statutory construction at issue here, it is worth recalling that *Cox Broadcasting* was decided after both the initial passage of FOIA with Exemption 6, and the 1974 amendments that introduced Exemption 7(C). Particularly at the time Congress enacted Exemption 7(C), there was substantial support for the notion that publication of old conviction records could be an actionable invasion of privacy. See *Briscoe v.*

Respondents have not been barred from publishing any information in their possession, but have merely been denied an additional, more convenient source of information. Nor is there any occasion in this case for the Court to consider the scope of any constitutionally based right of privacy, which would raise far different concerns. See *Department of the Air Force v. Rose*, 425 U.S. 352, 389 (1976) (Rehnquist, J., dissenting).⁶ Rather, the lesson to be drawn from the general law of privacy is simply that the term encompasses a great breadth of concerns, specifically including the dissemination of obscure information about individuals. Nothing in the language or history of FOIA indicates that Congress meant to exclude any part of the broad concept of privacy from the assessments required to be made under Exemptions 6 and 7(C).

2. On the contrary, FOIA's history shows that Congress intended Exemptions 6 and 7(C) to encompass a full range of privacy concerns, and indeed was aware of the particular privacy concerns posed by compilations of data such as criminal history records. For purposes of the present case, the relevant history includes both that of Exemption 6, enacted as an original part of FOIA, and Exemption 7(C), enacted as part of the 1974 FOIA amendments and further amended in 1986.

a. The history of Exemption 6 itself, although limited, reflects both the importance Congress attached to privacy concerns and the open-ended nature of the range of such concerns. Early drafts of FOIA had no provision com-

Reader's Digest Ass'n, 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971).

⁶ As Justice Rehnquist recognized there, this Court's ruling in *Paul v. Davis*, 424 U.S. 693 (1976), to the effect that there is generally no constitutional bar to the dissemination of arrest records, has no bearing on the FOIA issue raised where "the custodian of the records *** has chosen not to disseminate the records" (425 U.S. at 389).

parable to the present Exemption 6 because it was assumed that specific statutory provisions, such as those protecting income tax returns from public disclosure, would adequately address privacy concerns. See S. Rep. 1219, 88th Cong., 2d Sess. 14 (1964), *FOIA Source Book* 86, 99.⁷ In the course of hearings on the draft bill, however, Congress became aware that various federal agencies maintained "great quantities of files" on individuals the confidentiality of which was not addressed by statute (*ibid.*).⁸

Recognizing that it would be impossible to foresee all of the circumstances in which legitimate privacy concerns could be raised, Congress opted for a "general exemption" in which privacy concerns and the public interest in disclosure would be balanced on a case-by-case basis. S. Rep. 1219, *supra*, at 7, *FOIA Source Book* 92; H.R. Rep. 1497, 89th Cong., 2d Sess. 11 (1966), *FOIA Source Book* 22, 32; S. Rep. 813, *supra*, at 9 (1965), *FOIA Source Book* 36, 44; *Department of the Air Force v. Rose*, 425 U.S. at 373 n.10 (emphasizing the "general" nature of Exemption 6). By that approach, Congress sought to accommodate FOIA's "broad philosophy" of disclosure to "certain equally important rights of privacy with respect to

⁷ This report accompanied S. 1666, 88th Cong., 1st Sess. (1963), a progenitor of FOIA passed by the Senate but not the House in the Eighty-eighth Congress. A substantially similar bill was enacted in 1966 by the Eighty-ninth Congress. See *FOIA Source Book* 8.

⁸ Numerous agencies, as well as the American Bar Association, testified in the 1963 Senate hearings about the need for privacy protection. See *Freedom of Information: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 89-91, 152, 173-174, 199-200 (1963) [hereinafter 1963 Hearings]. Senator Bayh, in urging the Committee to include a privacy provision, referred to the protection of privacy as a matter warranting "equal attention" to that given the underlying goal of freedom of information (*id.* at 50).

certain information in Government files." S. Rep. 813, *supra*, at 3, *FOIA Source Book* 38. Specifically, Congress sought to exclude from mandatory disclosure "those kinds of files the disclosure of which might harm the individual" (H.R. Rep. 1497, *supra*, at 11, *FOIA Source Book* 32; see *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982) (emphasizing the quoted language))—a conception of "privacy" that is certainly broad enough to take account of the harm that flows when an individual's "public" but obscure arrest record is given out by the FBI.

b. In order to determine whether the statutory term "privacy" is broad enough to encompass a concern for limiting the dissemination of obscure "public" records, it is useful to see whether those who have expressed such a concern have phrased it in terms of "privacy." The years between the initial passage of FOIA in 1966 and the 1974 amendments that added Exemption 7(C) saw a remarkable amount of attention focused on the "privacy" implications of criminal history records and other accumulations of individual data by government—by commentators,⁹ law enforcement organizations,¹⁰ the courts,¹¹ and Congress

⁹ See, e.g., A. Westin, *Privacy and Freedom* (1967); A. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (1971).

¹⁰ As recounted in detail in D. Marchand, *The Politics of Privacy, Computers, and Criminal Justice Records* 55-166 (1980), law enforcement agencies devoted a great deal of attention in the late 1960s and early 1970s to the perceived need for improving criminal history record systems and for working toward automated coordination of such systems among various law enforcement agencies. The rapid progress in this area soon gave rise, however, to recognition of the possible adverse effects that such improvements could have on the individuals involved—a concern that was shared by many law enforcement officials. See, e.g., *id.* at 125-131, 146-162. One of the important early efforts at delineating privacy policies for such record systems

itself. In 1971 a subcommittee of the Senate Judiciary Committee held hearings on a broad range of "privacy" concerns raised by the large quantities of data collected by federal agencies and made readily accessible by centralization and computerization. See *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971) [hereinafter *1971 Hearings*]. One of the specific focuses of those hearings was the privacy concerns associated with compilations of criminal history information. See *id.* at 649-680 (testimony of Dr. Robert Gallati, Chairman of Project SEARCH Privacy Study and Director of New York State Identification and Intelligence System); *id.* at 849-860 (testimony of Richard W. Velde, Associate Administrator, LEAA). Dr. Gallati noted that "[t]he mere fact that

was a 1970 report by Project SEARCH (the precursor of amicus SEARCH Group Inc.), which recommended, among other things, strict controls to limit access to such information (see *id.* at 127-129).

¹¹ See *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970), on remand, 328 F. Supp. 718 (D.D.C. 1971), rev'd in part *sub nom. Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974). In the *Menard* litigation, 28 U.S.C. 534 (the statute authorizing the FBI to compile rap sheets) was interpreted—in order to avoid what were perceived as constitutional "privacy" concerns—to limit the FBI's discretion to release rap sheet information. See 430 F.2d 490-492; 328 F. Supp. at 726. That holding, and the congressional response seemingly upholding its premise, formed the basis for our argument below that Section 534 qualified as an Exemption 3 statute. See Gov't C.A. Br. 24-27. Although we do not advance the Exemption 3 argument before this Court, and we do not necessarily endorse the constitutional theories voiced in the *Menard* opinions, they reflect one understanding of "privacy" in this context, which was in fact known to Congress. See *Dissemination of Criminal Justice Information: Hearings Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 88, 233-281 (1974) [hereinafter *House Criminal Justice Hearings*].

[a criminal history record] system deals exclusively with public record data does not eliminate the need for attention to security and privacy protection" (*id.* at 657).

Hearings held by a subcommittee of the House Judiciary Committee in 1973 and 1974, which focused exclusively on criminal justice information, repeatedly noted concerns of privacy regarding criminal history records. *Dissemination of Criminal Justice Information: Hearings Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 1, 76-78, 187, 211-212, 214-215 (1974).¹² In these hearings, it was expressly recognized that criminal history records consist of entries that are "public records" else-

¹² Contrary to the court of appeals' implications, the fact that these hearings did not lead to more comprehensive changes in laws regarding criminal history records systems does not mean that Congress rejected "the federal policy that [petitioners] now urge" (Pet. App. 42a, 23a n.15). The bills under consideration dealt with a broad range of issues regarding criminal history records, such as the accuracy and completeness of such records, provisions for the subject's right to inspect them, and specific limits on the use of arrest records (see *House Criminal Justice Hearings* 2-75). Moreover, insofar as they addressed the dissemination of such records, these hearings and the draft legislation under consideration focused not on "public" access to them, but on the selective and sometimes improper access gained by employers, credit bureaus, and other entities in ways that had nothing to do with FOIA (*id.* at 135-136, 161, 187, 213). The lack of any attention to FOIA at such hearings is easily explained, moreover, by the fact that at that time such records were undoubtedly assumed to be exempt from its coverage, either by virtue of Exemption 7, which exempted nearly all law enforcement files (see *FBI v. Abramson*, 456 U.S. at 627), or by Exemption 3, as triggered by 28 U.S.C. 534, which had been recently interpreted as restricting dissemination of such records (see note 11, *supra*). The true relevance of these hearings does not lie in the fact that the specific legislation under consideration was not passed, but in the light they shed on the congressional understanding of the term "privacy" at this time.

where, but that nevertheless pose serious privacy problems precisely because of the increased ease of access. See *id.* at 160 (state law enforcement official, likening such compilations to a "freeway into the privacy of the individual"); *id.* at 215 (Attorney General Saxbe, stating that the "very inefficiency of [non-automated criminal history] systems was one of the chief protections of individual privacy"). Subcommittee Chairman Edwards, addressing this issue, concluded (*id.* at 222):

[P]ublic records [are] something that any citizen can examine, like court dockets and court proceedings. The problem is that when this information is pumped into a data processing system on a nationwide basis, the rights of people can be seriously impaired.

Congress also took specific action on these concerns in 1973, by enacting a provision conditioning LEAA grants for criminal history record systems on assurances that "the security and *privacy*" of such information is maintained, and that it "shall only be used for law enforcement and criminal justice and other lawful purposes" (42 U.S.C. (& Supp. III) 3789g(b) (emphasis added)).¹³ In the legislative history of that provision, Congress referred to "the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemina-

¹³ Indeed, as noted by Judge Starr in dissent below, a "host of state laws" protect the very sort of criminal history compilations at issue here from disclosure (Pet. App. 44a). Such state laws are based on the realization that compilations of criminal history records into readily accessible form pose significant "privacy" concerns even though the individual entries may be "public" at their original sources. See generally R. Smith, *Compilation of State and Federal Privacy Laws* at v, 3-4 (1984-1985 ed.); Lautsch, *Digest and Analysis of State Legislation Relating to Computer Technology*, 20 Jurimetrics J. 201, 210-211 (1980).

tion of criminal justice information.” S. Conf. Rep. 93-349, 93d Cong., 1st Sess. 7-8, 32 (1973).

c. These developments of the early 1970s shed important light on the common and congressional understanding of the term “privacy” at that time and are thus highly relevant to the interpretation of the privacy provision at issue here—Exemption 7(C), which was added to FOIA in 1974. See *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541, 545 (1978) (interpreting the term “boycott” in light of a “tradition of meaning,” including “the customary understanding *** at the time of enactment”). Exemption 7(C), modeled on Exemption 6 but expressly affording greater leeway for withholding by referring to “unwarranted” rather than “clearly unwarranted” invasions of personal privacy,¹⁴ was part of an overall restructuring of Exemption 7, in which the broad exemption of law enforcement records was replaced by several more closely tailored exemptions for particular types of law enforcement records. See generally *FBI v. Abramson*, 456 U.S. at 621-622. The history of Exemption 7(C) as such is extremely sparse (see *id.* at 634 (O’Connor, J., dissenting)), because the entire amendment to Exemption 7 was offered as a floor amendment. See 120 Cong. Rec. 17033-17041 (1974), *FOIA Source Book II* 332-352. In addition to the background discussed above, however, the history of the Privacy Act of 1974 (5 U.S.C. 552a) reflects

¹⁴ This alteration was a deliberate broadening of the privacy protection in the law enforcement area, in response to criticisms of the proposed legislation by President Ford. H.R. Conf. Rep. 93-1380, 93d Cong., 2d Sess. 12 (1974), reprinted in Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents* 219, 229 (1975) [hereinafter *FOIA Source Book II*]; 120 Cong. Rec. 33158-33159 (1974), *FOIA Source Book II*, at 368-372.

clearly the scope of Congress’s understanding of the term “privacy” at that time. Because these two enactments were under consideration during the same period of time¹⁵ and were intended to complement each other,¹⁶ the history of the Privacy Act is also relevant to the meaning of the term “privacy” as used contemporaneously in Exemption 7(C). Cf. *United States v. Stewart*, 311 U.S. 60, 64-65 (1940).

As Judge Starr noted in his dissent below, the Privacy Act’s history reflects clear congressional concern with the privacy implications of large data banks. See Pet. App. 44a (citing H.R. Rep. 93-1416, 93d Cong., 2d Sess. 3, 6-9 (1974), *Privacy Act Source Book* 296, 299-302).¹⁷ Moreover, a major impetus to the passage of the Privacy Act was the realization that, while government had long collected substantial amounts of information concerning individuals, new means of expanding access and easing retrieval of such information posed a distinct and far greater threat to personal privacy. See 120 Cong. Rec. 12646-12647 (1974), *Privacy Act Source Book* 4-6 (remarks of Sen. Ervin); S. Rep. 93-1183, 93d Cong., 2d Sess. 9-10 (1974), *Privacy Act Source Book* 154, 162-163 (remarks of Sen. Goldwater, noting privacy implications of computerized government data banks arising from the

¹⁵ Consideration of both measures took place during overlapping periods of 1974. Indeed, Congress gave final approval to the Privacy Act on the same day it overrode President Ford’s veto of the FOIA amendments. See Senate Comm. on Government Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974, Source Book on Privacy* 1182 (1976) [hereinafter *Privacy Act Source Book*].

¹⁶ See 121 Cong. Rec. 32888 (1975), *Privacy Act Source Book* 1173 (remarks of Sen. Kennedy).

¹⁷ Indeed, the committee hearings included specific focus on the special privacy concerns raised by “interlocking relationships *** between Federal and local data handlers in the enforcement field.” S. Rep. 93-1183, *supra*, at 18, *Privacy Act Source Book* 171.

ability of such systems to centralize and make readily retrievable information that would otherwise be inaccessible because of limitations of time and distance). Thus, at the time that Congress was contemplating the “privacy” language of Exemption 7(C), it understood that term as encompassing the unique and important concerns raised by large government compilations of scattered personal records.¹⁸

In sum, the full legislative background of the FOIA privacy exemptions, and the broad nature of “privacy” as a general principle of law, support the proposition that the subject of a compiled “rap sheet” may indeed have a strong “privacy” interest in the withholding of that document, even if the raw data on which it was based are matters of public record if one knows where to look.

B. Assessment Of The Privacy Interest In Nondisclosure Requires A Practical Evaluation Of All Relevant Factors

Once the proper range of “privacy” interests under the statute is understood, the assessment of the privacy side of the balancing test becomes a straightforward exercise in common sense and judgment. As the previous pronouncements of this Court make clear, such an assessment must be governed by a sensible evaluation of all relevant circumstances rather than a mechanical application of bright-line rules either favoring or barring disclosure. The analysis of the court of appeals ignores these important

¹⁸ This conclusion is further supported by the provisions of the Privacy Act, which include, among other things, a provision specifically permitting the exemption of criminal history records from most of the rights granted by the Act, including the right of access to such records by the subject himself (5 U.S.C. 552a(j)(2)(A)). Such a provision would have had little point if Congress had shared the court of appeals’ view of FOIA, under which most criminal history records would be freely available to anyone, including, of course, the subject.

lessons, and, as the dissent below noted, collapses the entire analysis into a “deference-driven, single-factor test” (Pet. App. 48a).

1. In *Department of the Air Force v. Rose, supra*, this Court addressed for the first time the nature of the balancing test to be applied under Exemption 6. The Court first rejected a per se rule proffered by the government—*i.e.*, that the “clearly unwarranted invasion” language of Exemption 6 modified only “similar files,” and hence that *all* “personnel” and “medical” files were exempt (425 U.S. at 370-376). Despite the grammatical ambiguity that made such a reading plausible, the Court rejected such a “blanket exemption,” in an extensive review of the legislative history that emphasized the “general” nature of the exemption and Congress’s consistent preference for case-by-case balancing in this area instead of per se rules (425 U.S. at 372-373).

In conducting such balancing, moreover, the Court indicated that the assessment of the privacy interests at stake should take into account practical considerations such as the likelihood that persons with prior access to the information may not have realized its significance or may have forgotten what they once knew (see 425 U.S. at 380-381; see also *id.* at 389 (Blackmun, J., dissenting)). As the court of appeals decision affirmed in *Rose* explained, “a person’s privacy may be as effectively infringed by reviving dormant memories as by imparting new information” (*Rose v. Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974)). The approach of the court of appeals in the present case—which treats all “public records” as equally devoid of privacy implications, regardless of how obscure or difficult to obtain they are as a practical matter—is at odds with this pragmatic approach to assessing the “privacy” interest that an individual justifiably has in information regarding past charges of misconduct that,

although available at some time or at some location, is not now in fact widely known or easily discoverable.

In *United States Dep't of State v. Washington Post Co.*, *supra*, this Court rejected an attempt by the court of appeals to substitute a mechanical, *per se* rule for the careful balancing of interests required by the FOIA privacy exemptions. The Court reversed a ruling that the "similar files" subject to Exemption 6 are limited to files reflecting "intimate details," holding instead that the exemption applies broadly to information "'the disclosure of which might harm the individual,'" and that it is "the balancing of private against public interests, not the nature of the files in which the information was contained, [that] should limit the scope of the exemption." 456 U.S. at 599 (quoting H.R. Rep. 1497, *supra*, at 11, *FOIA Source Book* 32). In the same vein, the Court observed that even data that are "not normally regarded as highly personal"—in particular, such mundane matters as "place of birth, date of birth, date of marriage, [and] employment history"—"would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy" (456 U.S. at 600). That observation is difficult if not impossible to reconcile with the view taken below that there is, of necessity, only a "low-level privacy interest" in any records that happen to be "public[ly] availab[le] somewhere in the nation" (Pet. App. 19a-20a).

This Court in *Washington Post* also commented specifically on the matter of requests for "public records." In remanding that case (which involved a request for information regarding whether certain individuals held United States passports), the Court stated that, in the weighing of interests to be conducted, "the fact that citizenship is a matter of public record somewhere in the Nation *cannot be decisive*" (456 U.S. at 603 n.5 (emphasis added)). Although the Court indicated that the "public

nature of the information" *may* support disclosure in a given case, it can do so only as part of a consideration of "all the circumstances" of such a case (*ibid.* (emphasis added)).¹⁹ The court of appeals' analysis in the present case—which *does*, as a practical matter, treat the "public record" status of arrest and conviction records as "decisive"—contradicts that admonition.²⁰

2. When the teachings of these cases are applied to the situation at hand, a number of common-sense factors emerge as relevant to the strength of the privacy interests at stake. A starting point is the inherently derogatory nature of an arrest record, which, in addition to affecting an individual's reputation as such, may inflict substantial harm by restricting his opportunities for employment, education, housing, and financial services (see J.A. 81-82,

¹⁹ The Court gave "past criminal convictions" as a specific example of the kind of record whose "public nature" could not be decisive but might be a reason to release the record after considering "all the circumstances of a given case" (456 U.S. at 603 n.5).

²⁰ Respondents have emphasized (Br. in Opp. 11) the court of appeals' *only* qualification to its *per se* rule—its statement that a significant privacy interest *might* be created by a showing of "particular harm" to the subject of the record (Pet. App. 40a). This grudging departure from an otherwise blanket rule is a far cry from the balanced consideration of "all the circumstances of a given case" contemplated by this Court. Moreover, the court's requirement of particularized harm is directly contrary to the words of the statute, which exempt law enforcement records the disclosure of which "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C) (emphasis added)). Finally, by acknowledging a privacy interest *only* when such concrete harm is shown, the court of appeals ignored most of the interests encompassed by the term "privacy," which, as discussed above, pertains principally to the intangible yet important interest of individuals in controlling the dissemination of information about themselves. See *Miller v. Bell*, 661 F.2d 623, 629-630 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

74-75; *House Criminal Justice Hearings* 76, 109, 122-125; *Menard v. Mitchell*, 430 F.2d at 490; D. Marchand, *The Politics of Privacy, Computers, and Criminal Justice Records* 96-100 (1980)).²¹ The strength of this factor will of course vary according to the character of the particular crimes at issue, but this potential for harm is a privacy interest that must always be considered in the Exemption 6 or 7(C) balance. See *Washington Post*, 456 U.S. at 599 (quoting H.R. Rep. 1497, *supra*, at 11, *FOIA Source Book* 32).

Similarly, the age, location, and character of any charges involved in a particular criminal history record will have a bearing on the strength of the privacy interest. For example, if an arrest took place in the distant past, if it did not then attract great notoriety, and if it occurred in an area distant from where the subject now lives, the subject will have an especially strong interest in protecting such information from release to any person who might request it. See *Rose*, 425 U.S. at 389 (Blackmun, J., dissenting) ("It is sad to see * * * individuals placed in jeopardy and embarrassment for lesser incidents long past.").²²

²¹ One problem discussed in the cited hearings was that those adverse effects are suffered disproportionately by racial minorities. *House Criminal Justice Hearings* 106, 111-112; see also D. Marchand, *supra*, at 106-107.

²² The five Justices in the majority in *Rose* did not fail to recognize the substantial privacy interest that generally inheres in information about past misconduct or allegations of misconduct. They felt, however, that the redaction of identifying information generally sufficed to protect that interest and that instances in which redaction was not sufficient could be handled on a case-by-case basis rather than through a general denial of access (see 425 U.S. at 380-381). Here, of course, respondents propose no steps to prevent identification of the individual. They obviously could not do so, since they claim the right

An additional factor that affects the weight of the privacy interest is the character of a particular rap sheet entry—e.g., whether it reflects a criminal conviction, or merely an arrest. Although both sorts of records may prove harmful to the subject, much of the attention that has been given to the privacy ramifications of criminal history records has focused on bare arrest records, which, although they are obviously less reliable indicators of a person's character, may have the same adverse consequences as conviction records.²³ The uncertainty and potential unfairness surrounding arrest records is exacerbated in the case of rap sheets, since the FBI has no reliable way of knowing, without burdensome additional investigation on its part, whether a given "arrest" entry resulted in a conviction, an acquittal, or even dismissal of charges based on a finding of lack of probable cause.²⁴

Consideration of those factors—and any others that present themselves in particular cases—will ensure that the important practical concerns that individuals have regarding their criminal history records will be given the consideration Congress intended. If, on the other hand, the

to obtain the arrest records of named individuals so long as the underlying data are "public" somewhere.

²³ See 1971 Hearings 858-860 (remarks of Sen. Ervin); *House Criminal Justice Hearings* 76, 109; D. Marchand, *supra*, at 101-102.

²⁴ See *Menard v. Mitchell*, 328 F. Supp. at 723-724. A related problem facing the FBI with respect to conviction records is that it generally has no way of knowing—without resort to additional investigation—whether a particular conviction record has been expunged at the original source. Although the FBI and the law enforcement entities that contribute rap sheet data make substantial efforts to prevent the preservation in FBI records of information expunged at the local level, inevitable imperfections magnify the privacy concerns surrounding dissemination of rap sheet information.

court of appeals' approach of equating "privacy" with official secrecy at every level of government were adopted, the lives of millions of persons would become a good deal less private.

C. The Court Of Appeals' Test Improperly Requires The FBI, In Responding To Individual FOIA Requests, To Investigate The Disclosure Practices Of Other Governmental Entities

In addition to the errors already noted, the court of appeals imposed on the FBI the task of ascertaining whether the requested information is available as a "public record" in some other, nonfederal government office, a fact on which the court's privacy analysis turns, but which is often not known to an agency when a FOIA request is made. In so doing, the court imposed administrative burdens not contemplated by FOIA and ignored the pertinent statutory standard regarding disclosures that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C)).

1. When it receives a FOIA request for rap sheet information, the FBI generally will not be certain, without further inquiry, whether any particular arrest entry on a rap sheet is reflected in local "public records." Even if the state agency that submitted an arrest record considers such information confidential, for example, the information may still be "public" at its original source. And, as noted above, the FBI would have no way of knowing, without a specific inquiry at the time of the FOIA request, whether an arrest or conviction has been expunged from the public record. The test imposed by the court of appeals, however, would *require* the FBI (and the court reviewing *de novo*) to determine, as a condition of nondisclosure (Pet. App. 42a), "as a matter of fact, not law, whether, by reason of the actual practices of the jurisdiction that is the original

source, the subject's privacy interest has faded."²⁵ As the dissent below recognized, the administrative burden that this aspect of the majority's opinion would impose would be "substantial (if indeed not crippling)" (Pet. App. 46a).

A requirement that agencies ascertain, at the time of each FOIA request, the status of particular information under local law imposes a new and distinct obligation on agencies in responding to FOIA requests, which is to be found nowhere in FOIA itself. See generally *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975) (condemning court-imposed requirement that agencies generate new records in order to respond to FOIA requests); see also *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 159-160 n.2 (1980) (Brennan, J., concurring in part and dissenting in part) ("FOIA [does not] compel[] the Government to conduct research on behalf of private citizens"). The court of appeals' analysis, however, affords an agency no other way of protecting even the conceded privacy interest in information that is secret at all levels of government. The court suggested that the FBI might fulfill its obligation by referring the requester to the providing agency (Pet. App. 26a). Such a response, however, would tell the requester that the subject "has an arrest record"—incomplete yet damaging information that may be all the requester cares to know.

²⁵ A subsequent decision of the court of appeals confirms that its approach to privacy interests under Exemptions 6 and 7(C) will make it essential for agencies to ascertain the "public record" status of requested information. In *Ostrer v. FBI*, 836 F.2d 1408 (D.C. Cir. 1988) (Table), a case involving FBI rap sheets, the court in its unpublished opinion remanded for further consideration in light of the present case, stating, "[i]n order to evaluate the privacy interest, we need to know whether the information in the 'rap sheets' has been placed in the public domain by any local, state, or federal agency" (slip op. 9).

Nor is it any answer to say, as respondents do (Br. in Opp. 13 n.4), that the government may avoid this burden by exercising discretion to release such information even if it qualifies for withholding under FOIA. Unless disclosure of such information is *required* by FOIA, it is *prohibited* by the Privacy Act (5 U.S.C. 552a(b)(2)). Thus, the court of appeals' approach would indeed compel the FBI, as well as other federal agencies in possession of such data compiled from other "public" sources, to determine how other governmental entities have treated particular information.

2. Apart from its imposition of an unmanageable standard involving burdens not envisioned by Congress, the court of appeals' insistence that agencies ascertain the local "public record" status of information violates FOIA principles by demanding a level of certainty in these matters that Congress never intended. From the earliest consideration of the FOIA privacy exemptions, Congress recognized that the privacy implications of particular information would not always be clearcut. It therefore provided for the withholding of "files the disclosure of which *might harm* the individual." H.R. Rep. 1497, *supra*, at 11, *FOIA Source Book* 32 (emphasis added); see *Washington Post*, 456 U.S. at 599.

Congress's desire to guard against the substantial possibility and not just the certainty of individual harm is especially clear in the context of law enforcement records. In 1986, Congress amended Exemption 7(C), so that it now expressly exempts records the disclosure of which "*could reasonably be expected to* constitute an unwarranted invasion of personal privacy" (new language emphasized). This change was made "with the avowed purpose of * * * eas[ing] considerably a Federal law enforcement agency's burden in invoking [the exemption].'" See *Irons v. FBI*, 811 F.2d 681, 687 (1st Cir. 1987) (quoting 132 Cong. Rec. S16504 (daily ed. Oct. 15, 1986)).

Application of this "reasonably expected" language, together with a proper understanding of the term "privacy" as discussed above, shows that the unworkable scheme envisioned by the court of appeals is entirely unnecessary. When the FBI receives a FOIA request for a rap sheet, it knows without any further investigation that a given entry may well be a matter of public record "somewhere in the nation," but that it is also quite likely that the record is freely available if at all only from the local agency (*e.g.*, county court or local police department) from which it originated. This information, together with the practical considerations noted above (date, location, character of offense, and type of entry), provides an ample basis on which the agency can base a pragmatic assessment of the degree to which release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

II. THE BALANCING TEST UNDER EXEMPTIONS 6 AND 7(C) REQUIRES AN ASSESSMENT OF THE PUBLIC INTEREST IN THE DISCLOSURE OF PARTICULAR INFORMATION, GUIDED BY THE BASIC POLICIES OF FOIA

The court of appeals made an even more radical departure from settled law when it turned to the "public interest" side of the balancing test. Rather than engaging in the straightforward weighing of competing interests that the statute calls for, the court asserted that it "cannot" make any assessment of the particular public interest in the disclosure of any specific information (Pet. App. 38a). That unprecedented approach to balancing under Exemptions 6 and 7(C)—which even respondents do not defend (Br. in Opp. 5, 18)—fails to effect the judicious balancing of interests called for by Congress, ignores the nature of the interests to be balanced, and—as recognized by the

two judges who have actually considered the competing interests on the facts of the present case—would lead to an incorrect result here.

A. A Refusal To Consider The “Public Interest” In The Release Of Particular Information Would Preclude A Meaningful Balancing Of Interests And Lead To Illogical Results

As this Court has repeatedly recognized, the use of the word “unwarranted” in the FOIA privacy exemptions requires “‘a balancing’ of the private and public interests.” *Rose*, 425 U.S. at 373; see *Washington Post*, 456 U.S. at 599. That conclusion derives directly from the legislative history of Exemption 6, which calls for such a balancing in clear terms (S. Rep. 813, *supra*, at 9, *FOIA Source Book* 44):

The phrase “clearly unwarranted invasion of personal privacy” enunciates a policy that will involve a balancing of interests between the protection of an individual’s private affairs from unnecessary public scrutiny, and the preservation of the public’s right to governmental information.

Although this Court has not previously had occasion to elaborate on the manner in which courts are to assess the weight given to “the public’s right to governmental information” in this balance, such assessments have routinely focused on the “public interest” in the release of the particular information sought, with the result often turning on whether the court has believed that interest to be substantial or slight.²⁶

²⁶ See, e.g., *Columbia Packing Co. v. United States Dep’t of Agriculture*, 563 F.2d 495, 499 (1st Cir. 1977); *Aronson v. United States Dep’t of HUD*, 822 F.2d 182, 185-186 (1st Cir. 1987); *Committee on Masonic Homes v. NLRB*, 556 F.2d 214, 220-221 (3d Cir. 1977); *Core v. United States Postal Service*, 730 F.2d 946, 948-949 (4th Cir. 1984); *Heights Community Congress v. Veterans Ad-*

The court of appeals rejected that approach to public interest assessments under FOIA, stating that it found such assessments “awkward[]” and doubted its authority to make such “idiosyncratic determinations” on a case-by-case basis (Pet. App. 23a). Instead, the court concluded that “the phrase ‘public interest,’ as used in the balancing in Exemptions 6 and 7(C) of the Act, means [nothing] more or less than the general disclosure policies of the statute” (*id.* at 39a). Holding that the public interest in particular disclosures cannot be “judged at all” (*ibid.*), the court posited a purely static “public interest” in the release of *any* information in the government’s possession, which could be “balanced” against any particular harm to the subject of the information (*id.* at 40a).

That altogether novel approach (see Pet. App. 48a (Starr, J., dissenting)) would lead to illogical practical consequences far more troubling than the “idiosyncratic” determinations the court of appeals feared. Under that analysis, a court would be *incapable* of distinguishing between a FOIA request for personal information about “one’s otherwise inconspicuously anonymous next-door neighbor” and one concerning “a public figure or an official holding high government office” (*id.* at 45a).

ministration, 732 F.2d 526, 529-530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984); *Minnis v. United States Dep’t of Agriculture*, 737 F.2d 784, 786-787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Campbell v. United States Civil Service Comm’n*, 539 F.2d 58, 62 (10th Cir. 1976); *Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985); *Senate of Puerto Rico v. United States Dep’t of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987); see also *Arieff v. United States Dep’t of the Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (noting that asserted public interests in disclosure fell within FOIA’s “core purpose”); Pet. App. 37a (recognizing that “[p]rior cases of this circuit have purported to appraise and value the public interest in specific information sought”).

Depending on the assessment of the privacy interest at stake, that approach will lead to either gross over-disclosure or significant overwithholding. In the present case, the court of appeals' refusal to acknowledge the *lack* of any significant public interest in the release of most arrest records led it to adopt "a virtual *per se* rule" potentially affecting the privacy of millions of persons (Pet. App. 48a (Starr, J., dissenting)). If, on the other hand, it were determined that a particular class of records generally *did* pose privacy concerns outweighing the general FOIA policy of disclosure, agencies and courts would be powerless to make exceptions even if, in a particular instance, such records reflected large-scale fraud in government operations or the mental incapacity of public officials.²⁷ Such a mechanistic approach is the antithesis of the case-by-case balancing of interests envisioned by Congress.

The court of appeals was simply wrong in supposing that the balancing of a "public interest" in the disclosure of information against a potential invasion of privacy is a task beyond the capability of the judiciary.²⁸ This Court

²⁷ As noted above, the Privacy Act generally prohibits the release of information regarding individuals unless disclosure is required by FOIA.

²⁸ The court's concern about the awkwardness of such judicial appraisals was recognized – and answered – almost a century ago (Warren & Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 214 (1890) (footnote omitted)):

The right to privacy does not prohibit any publication which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest. There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other

has required determinations of whether particular information is of "public concern" for purposes of applying the First Amendment²⁹ and has called for the balancing of public and private interests in determining whether grand jury transcripts should be released.³⁰ Indeed, consideration of the "public interest" in the disclosure of particular information is a well-established criterion in other areas of FOIA law. For example, Congress has expressly made that "public interest" the principal standard for the waiver of search and duplication fees (5 U.S.C. (Supp. IV) 552(a)(4)(A)(iii)). Moreover, as the courts have uniformly recognized, the legislative history of the FOIA attorneys' fees provision (5 U.S.C. 552(a)(4)(E)) makes the "benefit to the public deriving from the case" one of the "central guidelines" in making the discretionary determination whether to award such fees to prevailing plaintiffs.³¹ Thus, the notion that courts "cannot" measure the public interest in disclosure of particular information (Pet. App.

branches of the law, – for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability.

Cf. Pet. App. 45a-46a (Starr, J., dissenting).

²⁹ See *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 757-761 (1985) (plurality opinion); *Connick v. Myers*, 461 U.S. 138, 143 & n.5 (1983); *Rankin v. McPherson*, No. 85-2068 (June 24, 1987), slip op. 6.

³⁰ See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223 (1979).

³¹ *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978) (citing S. Conf. Rep. 93-1200, 93d Cong., 2d Sess. 9 (1974); see *Fenster v. Brown*, 617 F.2d 740, 742-744 (D.C. Cir. 1979) (same)).

38a) is a marked departure from traditional jurisprudence, both generally and under FOIA itself.³²

More fundamentally, the court of appeals erred in supposing that the difficulty or “awkwardness” of assessing the public interest in the release of particular information gave it license to ignore Congress’s instruction to engage in meaningful balancing. In enacting Exemption 6, Congress squarely addressed that consideration, concluding that “[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either.” S. Rep. 813, *supra*, at 3, *FOIA Source Book* 38 (quoted in *Rose*, 425 U.S. at 373 n.9). As the dissenting judge below pointed out, “the federal courts are duty-bound, for better or worse, to perform the task Congress has assigned [them]” (Pet. App. 34a).

³² The court of appeals went particularly far astray when it claimed (Pet. App. 39a n.3; cf. *id.* at 25a & n.18, 38a-39a & n.2) that its novel analysis was supported by *FBI v. Abramson*, 456 U.S. 615 (1982). Although this Court did state in *Abramson* that “Congress * * * did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis” (456 U.S. at 631 (footnote omitted)) the Court certainly did not mean to disparage case-by-case balancing in the interpretation of the phrase “unwarranted invasion of personal privacy” in Exemptions 6 and 7(C). Rather, as Judge Starr pointed out (Pet. App. 32a-34a), the Court made the quoted statement *after observing* (456 U.S. at 623) that it was undisputed there that the requested disclosure would be an unwarranted invasion of privacy. The Court found case-by-case balancing to be inappropriate in determining whether the requested records were “compiled for law enforcement purposes” (5 U.S.C. (& Supp. IV) 552(b)(7)), not in determining whether their disclosure constituted an “unwarranted” invasion of privacy. Indeed, it was just one week before deciding *Abramson* that the Court emphasized – in a unanimous decision – the vital importance of judicial balancing to proper application of FOIA’s privacy exemptions. *United States Dep’t of State v. Washington Post Co.*, *supra*.

B. The Public Interest In Disclosure Should Be Assessed With Reference To FOIA’s Core Purposes

The case-by-case, *de novo* balancing mandated by Congress need not be the sort of standardless, “idiosyncratic” inquiry that the court of appeals feared. The policies of FOIA itself, as recognized by this Court, provide a structured means of assessing the weight of the “public interest” in a given case. In *Rose*, this Court stated that, in Exemption 6, “Congress sought to construct an exemption that would require a balancing of the individual’s right of privacy *against the preservation of the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny’*” (425 U.S. at 372 (quoting court of appeals opinion, 495 F.2d at 263) (emphasis added)). As the Court has elaborated elsewhere, the “basic purpose” of FOIA is “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The degree to which these core purposes of FOIA may be furthered by a given disclosure, weighed against the degree to which disclosure would invade the subject’s privacy interests, provides a sensible and statutorily based means of determining whether the invasion of privacy is “warranted” by “the public’s right to governmental information.” See S. Rep. 813, *supra*, at 3, *FOIA Source Book* 38.

Even though such a “core purposes” test is supported by the above-quoted language in *Rose*, and has been employed by a number of other courts in performing the required balancing,³³ the court of appeals below rejected

³³ See *Columbia Packing Co. v. United States Dep’t of Agriculture*, 563 F.2d at 499; *Committee on Masonic Homes v. NLRB*, 556 F.2d at 220; *Minnis v. United States Dep’t of Agriculture*, 737 F.2d at 787;

it, arguing that it should be left to “the citizenry” to assess the pertinence of any particular information to its need to be informed (Pet. App. 38a). Such reasoning reflects, of course, the *general* approach of FOIA. Congress believed that a policy of free disclosure would best serve democratic interests, and it sought, for the most part, to avoid broad inquiries such as whether a requester was “properly and directly concerned,” or whether there was “good cause” for withholding. See H.R. Rep. 1497, *supra*, at 5-6, *FOIA Source Book* 26-27 (citing standards from existing law regarding “public information,” 5 U.S.C. (1964 ed.) 1002). When privacy interests are implicated, however, Congress provided express exemptions to that general approach, which explicitly *do* call on agencies—and the courts, reviewing agency determinations *de novo* (5 U.S.C. 552(a)(4)(B))—to determine whether disclosures are “warranted.” Given Congress’s special concern for privacy interests,¹⁴ it should hardly be surprising that the protection of such interests calls for a test unlike those for application of other, categorical FOIA exemptions.

Congress has recently given even more concrete expression to its understanding of the “public interest” in the context of FOIA. In addition to modifying Exemption 7 as

Cochran v. United States, 770 F.2d at 956; see also Comment, *The Freedom of Information Act’s Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596, 606-610 (1976) (proposing such a test). Indeed, respondents in the present case appear not to take issue with the propriety of this test (Br. in Opp. 16-18).

¹⁴ As noted above, the legislative history reflects an assessment of privacy rights as “equally important” and deserving “equal attention” as the public’s right to information. See S. Rep. 813, *supra*, at 3, *FOIA Source Book* 38; 1963 Hearings 50 (remarks of Sen. Bayh, proposing inclusion of a privacy exemption).

discussed above, the 1986 FOIA amendments restructured the statutory provisions regarding search and duplication fees, and the waiver of those fees in certain instances. Pub. L. No. 99-570, § 1803, 100 Stat. 3207-49 to 3207-50 (amending 5 U.S.C. 552(a)(4)(A)). In the fee waiver provision—which had always been geared to a showing of the “public benefit” of particular FOIA disclosures—the 1986 amendments elaborate on that concept, specifying that fees should be waived or reduced “if disclosure of the information is in the public interest *because it is likely to contribute significantly to public understanding of the operations or activities of the government*” (5 U.S.C. (Supp. IV) 552(a)(4)(A)(iii) (emphasis added)). The legislative history of that provision indicates Congress’s belief that it reflects the preexisting “public interest” standard, and that this standard is capable of “objective[] evaluat[ion]” (132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (explanatory materials introduced by Rep. English)).

As the dissent below recognized, “there *is* meaning in the public-interest standard” (Pet. App. 45a). Congress has called on the courts to assess the public interest in the disclosure of particular information and has implicitly provided the criterion by which they may do so.¹⁵ The court of appeals erred in refusing to undertake that task.

¹⁵ That a court should evaluate the public interest in the disclosure of *particular information* does not mean, of course, that the analysis should turn on the nature or purpose of a *particular request*. We agree with the court below that FOIA’s command that nonexempt records be made available “to any person” (5 U.S.C. 552(a)(3)), and the lack of any mechanism in FOIA for limiting the dissemination of information once the government has given it out, preclude distinctions among various requesters or among uses to which the information will be put. See Pet. App. 23a-24a, 38a-39a & n.2; *NLRB v. Sears*,

III. THE AGENCY AND THE DISTRICT COURT PROPERLY DETERMINED THAT THE BALANCE OF PUBLIC AND PRIVATE INTERESTS IN THIS CASE SUPPORTS WITHHOLDING OF THE REQUESTED RECORDS

In the present case, both the Department of Justice and the district court, reviewing *de novo*, concluded that there was no information concerning Charles Medico in the pertinent files whose release was warranted in the public interest (J.A. 109, 117; Pet. App. 57a). The only judge of the court of appeals panel who purported to engage in an actual balancing of interests agreed with that conclusion and voted to affirm the judgment in the government's favor (Pet. App. 49a). The agency and those judges correctly assessed the competing interests in this case.

When a FOIA request for specific criminal history records is made, there are, as Judge Starr noted below, two factors that are "powerfully relevant" to determining the extent of any public interest in their release—*i.e.*, the nature and age of any offenses recorded (Pet. App. 31a). Taken together with any information about the ways, if any, in which the subject is involved with "the operation or activities of the government" (see 5 U.S.C. (Supp. IV) 552(a)(4)(A)(iii)), those factors provide the agency and a reviewing court with an ample basis on which to determine whether release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Roebuck & Co., 421 U.S. 132, 143 n.10, 149 (1975); *Washington Post Co. v. Department of HHS*, 690 F.2d 252, 258 & n.17 (D.C. Cir. 1982); *Ditlow v. Shultz*, 517 F.2d 166, 172 n.21 (D.C. Cir. 1975). This proposition is simply irrelevant, however, to the question whether the courts are capable of assessing "the interest of the general public in release of the records themselves" (Pet. App. 26a).

Although the court of appeals majority maintained that "the government is utterly incapable of explaining to us why the information sought here does not serve the Act's 'core' policy" (Pet. App. 38a), we respectfully disagree. Public disclosure of the criminal records (if any) of Charles Medico would not serve FOIA's core policies because Mr. Medico is not himself a public official, and, although he is alleged to have had dealings with a former public official, no "financial crime" records that arguably might bear on that official's discharge of his public duties exist.³⁶ In the absence of any other alleged connection of Charles Medico to the functioning of government, it seems quite plain that nothing in his criminal record (if any) would aid an informed citizenry in the exercise of democratic political choices. That was certainly the conclusion drawn by the district court and by Judge Starr,

³⁶ In April 1983, when the government formally disclosed that no "financial crime" records existed in other than rap sheet form, the government neither confirmed nor denied that Charles Medico had a rap sheet containing financial crime information because the government was still maintaining that all rap sheet information was exempt under FOIA Exemption 3, as triggered by 28 U.S.C. 534 (see J.A. 105-106 n.3). Now that the court of appeals has rejected our Exemption 3 argument and we have not sought review on that issue in this Court, we are authorized to disclose that Charles Medico has no rap sheet containing financial crime information. Respondents have recently begun to speculate about other specified types of crimes (or alleged crimes) that might appear on Justice Department records concerning Charles Medico (see Br. in Opp. 17-18). We see no reason to engage in a second round of confessions that certain types of crimes would indeed be of such public interest as to warrant disclosure, accompanied by confirmations that no such records exist. Instead, we invite the Court to examine *in camera* the materials that we submitted to the district court. In our view, such *in camera* review will readily confirm that there are no records whose disclosure is supported by a public interest that outweighs Charles Medico's legitimate privacy interest.

both of whom had available to them the government's *in camera* submissions (see J.A. 18, 130-133), which contained any withheld criminal history information.

As often occurs in FOIA litigation, we cannot be specific in this brief (a public document) about the nature of any withheld records and the specific characteristics of those records (if any exist) that lead us to believe that Charles Medico's privacy interest outweighs any public interest in disclosure. We respectfully submit, however, that *in camera* examination of the records (if any), under a commonsense and practical balancing approach rather than the odd approach used by the court of appeals, admits of no other conclusion. We suggest that the Court review the *in camera* submission, and we submit that the Court should reverse and remand with instructions to affirm the district court's grant of summary judgment to the government.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

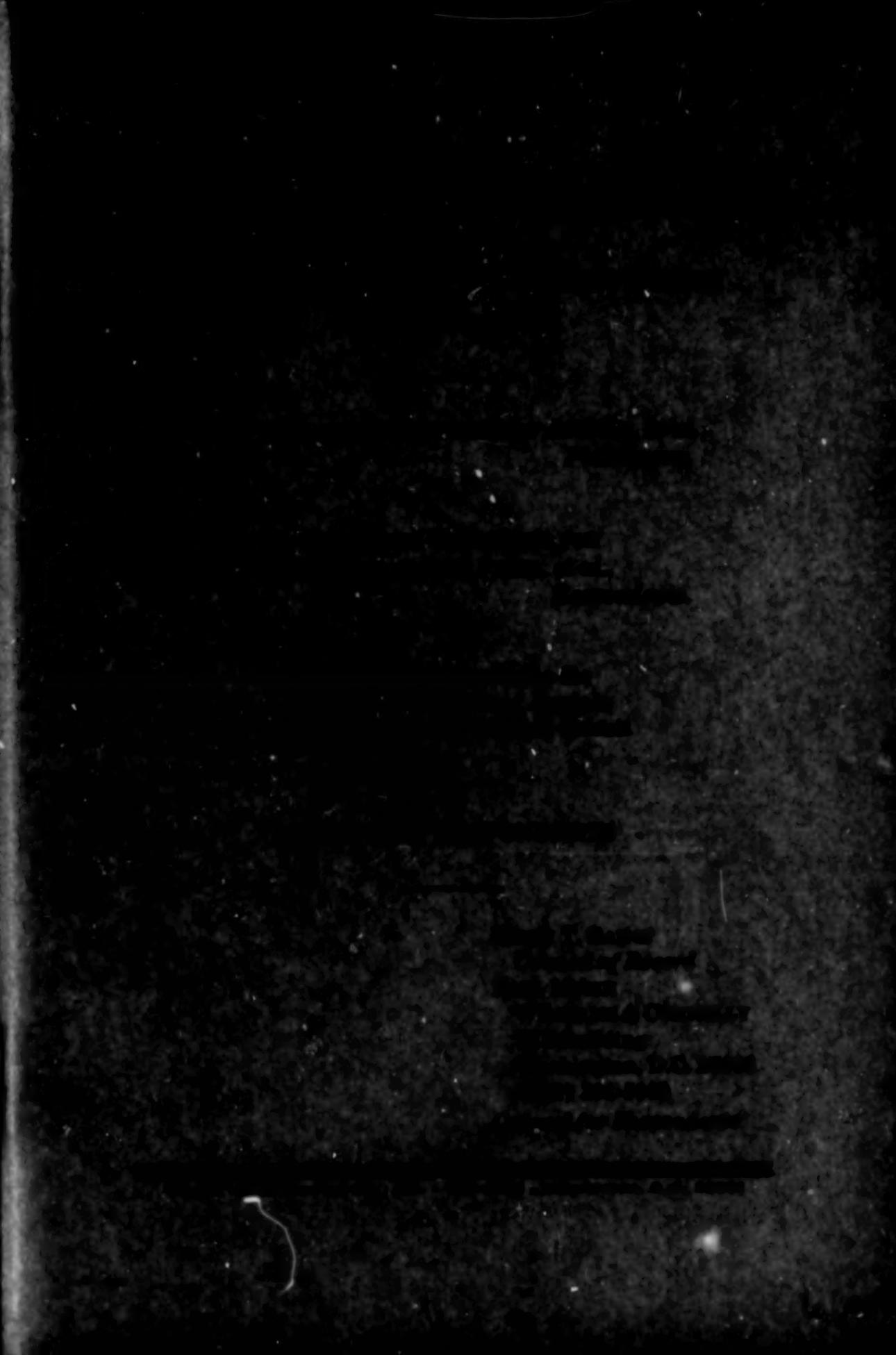
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JUNE 1988



QUESTIONS PRESENTED

1. Whether an individual has a substantial personal privacy interest in information concerning his criminal record, when that information is already a matter of public record.
2. Whether any personal privacy interest in such information is outweighed by the public interest in determining whether a company that received lucrative defense contracts with the help of an allegedly corrupt Congressman is dominated by organized crime.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-1379

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,
v.

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. The Freedom of Information Act Requests

This Freedom of Information Act ("FOIA") case arises out of a CBS News correspondent's investigation of alleged criminal conduct by Daniel Flood, a United States Congressman who eventually pled guilty to charges of conspiring to solicit illegal campaign contributions from prospective government contractors. In January 1978, there were published reports that the United States Attorney in Philadelphia was investigating allegations of

conflict of interest and corruption on the part of Flood and another Congressman, Joshua Eilberg. J.A. 96. CBS News assigned respondent Robert Schakne to investigate the allegations. *Ibid.*

During his investigation, Schakne learned that Congressman Flood had been instrumental in arranging Department of Defense contracts for Medico Industries. *Id.* at 97. Schakne also learned that the Pennsylvania Crime Commission had included Medico Industries in a list of "legitimate businesses dominated by organized crime figures [which] have received a number of lucrative public contracts." *Ibid.* Both the Pennsylvania Crime Commission and the Federal Bureau of Narcotics had identified William Medico, General Manager of Medico Industries, as a "criminal associate" of organized-crime leader Russell Bufalino. *Ibid.* The Pennsylvania Crime Commission had specifically stated that William Medico had a criminal record that included "arrests for suspicion of murder and assault, and convictions for bootlegging and disorderly conduct." *Ibid.*

In light of the great public interest in the investigation of Congressman Flood, and in the relationship between Flood and a business reportedly dominated by organized crime, Schakne sought further information about Medico Industries and its principals, William, Charles, Phillip and Samuel Medico. *Ibid.* Schakne was not content simply to report the Pennsylvania Crime Commission's conclusion that Medico Industries was "dominated by organized crime figures." He sought instead to investigate and confirm that conclusion. Specifically, he sought to ascertain William Medico's full criminal record, and to determine whether and to what extent the other Medicos, all principals of Medico Industries, had criminal records. *Id.* at 97-98.

On February 3, 1978, Schakne submitted a written FOIA request to the Department of Justice, seeking dis-

closure of any prison sentences, convictions, indictments or arrests of William, Charles, Phillip or Samuel Medico. *Id.* at 38, 98. The Department initially refused to provide any of the requested information. It claimed that disclosure would violate the Privacy Act, 5 U.S.C. § 552a, and that the information was therefore exempt under Exemption 3 of FOIA, which permits the withholding of information that is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b) (3). The Department also claimed that the information was compiled for law enforcement purposes and that its disclosure would "interfere with enforcement proceedings," "deprive a person of a right to a fair trial or an impartial adjudication," and "constitute an unwarranted invasion of personal privacy," 5 U.S.C. (Supp. IV) § 552(b) (7) (A), (B) & (C). J.A. 39, 44, 98.

After Schakne appealed, the Department agreed to disclose the criminal-identification record (*i.e.*, "rap sheet") of William Medico because he was deceased, as Schakne had noted in his request. *Id.* at 49, 99. It otherwise affirmed the denial of Schakne's request, relying solely upon Exemption 7(C) and Exemption 6, which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," 5 U.S.C. § 552(b) (6). J.A. 48, 99.

In September 1978, respondent Reporters Committee for Freedom of the Press filed a similar FOIA request. *Id.* at 53, 99. The Department responded that insufficient information had been provided to permit an accurate search for records pertaining to William Medico (whose rap sheet had already been located and disclosed to Schakne, *id.* at 51-52), and it denied the request for criminal-record information concerning the other Medicos, citing the Privacy Act. *Id.* at 55, 99-100. Following an administrative appeal, the Department affirmed the denial, relying on Exemptions 3 and 7(C). This time the

Department claimed that Exemption 3 was triggered not by the Privacy Act but by 28 U.S.C. § 534, which gives the Attorney General the authority to collect criminal-identification information and exchange it with other federal, state, and local officials. J.A. 59, 100.

B. The District Court's Decision

Having been unable to obtain any of the information requested with respect to Charles, Phillip or Samuel Medico, Schakne and the Reporters Committee filed suit under FOIA. The complaint sought only the disclosure of "matters of public record" that were responsive to the FOIA requests. *Id.* at 33. Both sides filed motions for summary judgment. *Id.* at 2, 8. The government initially relied almost exclusively on the contention that section 534 of Title 28 restricts disclosure of rap sheets, and that they are therefore exempted from disclosure by statute under Exemption 3. The government also made brief reference to Exemption 6, the general privacy exemption, and in a subsequent brief invoked Exemption 7(C), the privacy exemption for information compiled for law enforcement purposes.

On April 29, 1983, while the cross motions for summary judgment were pending, the government informed the district court of its decision to release all criminal-record information concerning Phillip and Samuel Medico, explaining that they had recently died and that disclosure was intended to be "consistent" with the earlier release of criminal-record information concerning William Medico. J.A. 103-04. As to Charles Medico, the government conceded that there was "a legitimate public interest purpose" warranting disclosure of "financial crime" information, but quickly added that it had no such information. *Id.* at 105. The government continued to withhold all "non-financial crime" information concerning Charles Medico. *Ibid.*

The district court granted the government's motion for summary judgment. It held that rap sheets could be withheld under Exemption 3, and that any responsive information in other documents could be withheld under Exemptions 6 and 7(C). Pet. App. 52a-58a. The court did not explain why Charles Medico could have any reasonable expectation of privacy as to the information sought, but concluded that any crimes other than financial crimes would be irrelevant to the matters respondents were investigating. *Id.* at 57a.

C. The Court of Appeals' Decision

The court of appeals reversed. It ruled initially that 28 U.S.C. § 534 is not a withholding statute under Exemption 3. Pet. App. 6a-13a. The government does not contest that ruling in this Court. Petition at 6 n.1.

The court also held that release of the criminal-record information requested would not constitute an unwarranted invasion of personal privacy under Exemptions 6 and 7(C). It concluded that there is only a minimal privacy interest in criminal-record information that is a matter of public record. Pet. App. 19a-20a. The court added, however, that for information to be a matter of public record, it is not enough that the information be available. *Id.* at 20a. Rather, the jurisdiction in question would have to have made "an affirmative determination that criminal records must be freely available to the general public and [have] provided a mechanism to ensure implementation of that policy." *Ibid.*

As to the public-interest side of the balancing required by Exemptions 6 and 7(C), the court concluded that deference should be accorded to a state's presumptive judgment that placing material in the public domain serves the public interest. *Id.* at 22a-23a. The court remanded for a determination of whether the Department of Justice holds criminal-record information concerning Charles Medico that is a matter of public record. *Id.* at 26a.

Judge Starr initially concurred in the judgment and in all of the majority opinion except for the discussion of the public-interest side of the balancing test. *Id.* at 27a.

After the government sought rehearing, the court clarified that the district court should determine “as a matter of fact, not law, whether, by reason of the actual practices of the jurisdiction that is the original source, the subject’s privacy interest has faded” because the information was a matter of public record. *Id.* at 41a-42a. The court also noted that it “might well have reached a different conclusion” if the government had shown that disclosure of the information would cause particular harm to Charles Medico. *Id.* at 40a.

The court modified its discussion of the public interest in disclosure as well. It explained that instead of deferring to state or local determinations regarding access to criminal records, *id.* at 36a-37a, courts should focus on “the general disclosure policies of [FOIA],” *id.* at 38a (footnote omitted). The court declined to make an assessment of the public interest based on the particular information at issue. *Id.* at 38a. Charles Medico, the court noted, was “alleged to have had dealings with government officials,” and it was “up to the citizenry, once informed, to determine the relevance of the age of the arrests or convictions.” *Ibid.* Judge Starr dissented. *Id.* at 42a-49a. A suggestion for rehearing en banc was denied, with four judges dissenting. *Id.* at 64a-66a.

The government then sought review in this Court of the court of appeals’ rulings concerning Exemptions 6 and 7(C). It abandoned the contention that 28 U.S.C. § 534 is a withholding statute for purposes of Exemption 3. On April 18, 1988, this Court granted certiorari.

SUMMARY OF ARGUMENT

The information sought by Schakne and the Reporters Committee is not exempt under either of FOIA’s privacy exemptions, Exemption 6 and Exemption 7(C), because its disclosure would not result in an “unwarranted” (Exemption 7(C)) or “clearly unwarranted” (Exemption 6) “invasion of personal privacy.” There is no significant personal privacy interest in criminal-record information that is a matter of public record, and any minimal personal privacy interest in such information is easily outweighed by the compelling public interest in disclosure of the information sought in this case.

For information to be eligible for withholding under Exemption 6 or Exemption 7(C), there must be a legitimate, objectively reasonable expectation of personal privacy as to that information. Only disclosures that compromise such expectations implicate Congress’s purpose of requiring “a balancing of interests between the protection of an individual’s private affairs from unnecessary public scrutiny, and the preservation of the public’s right to governmental information.” S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

There can be no justifiable expectation of personal privacy with respect to criminal-record information that is a matter of public record. Convictions, sentences, indictments, and arrests are inherently public matters; they are official steps in the process by which society formally condemns individuals for breaking the law. The arrest and prosecution of criminals is a subject of great public concern, and there is an historic tradition of opening criminal proceedings to the public. Moreover, records of convictions, sentences, indictments, and arrests are matters of public record in virtually all jurisdictions. This practice is important both because it reflects the widely held understanding that official steps in a criminal prosecution are public matters, and because there can be little privacy interest in information that is already a matter

of public record. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975).

If an individual has any legitimate expectation of personal privacy in his criminal record, that interest pales in comparison to the strong public interest in disclosure in this case. Respondents sought to confirm the official finding of the Pennsylvania Crime Commission that a defense contractor was "dominated by organized crime figures." J.A. 97. And they sought to explore the ties between that defense contractor and a powerful Congressman, then under investigation for corruption and conflict of interest, *id.* at 96, who had been instrumental in steering defense contracts to the company, *id.* at 97. Exposure of corruption in defense contracting was a matter of public interest in 1978, just as it is in 1988.

ARGUMENT

I. ONLY INFORMATION IMPLICATING A LEGITIMATE EXPECTATION OF PERSONAL PRIVACY IS ELIGIBLE FOR WITHHOLDING UNDER EXEMPTIONS 6 AND 7(C).

In enacting FOIA, Congress intended to establish "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976), quoting S. Rep. No. 813 at 3. As this Court noted in *EPA v. Mink*, 410 U.S. 73, 79 (1973), the prior public disclosure law, § 3 of the Administrative Procedure Act of 1946, 60 Stat. 237, 238, codified at 5 U.S.C. § 1002 (1964), "was plagued with vague phrases" that gave agencies virtually unlimited discretion to withhold information. See S. Rep. No. 813 at 3. Congress undertook to replace that statute with a general mandate of disclosure that was subject to specific, limited exemptions. "To make crystal clear the congressional objective . . . Congress provided in § 552(c) that nothing in the Act should be read to 'authorize withhold-

ing of information . . . , except as specifically stated . . . ?" *Department of the Air Force v. Rose*, 425 U.S. at 361 (emphasis added).

The two specific exemptions at issue here, Exemptions 6 and 7(C), are limited by their terms to "unwarranted" (Exemption 7(C)) and "clearly unwarranted" (Exemption 6) "invasion[s] of personal privacy." The threshold issue is whether disclosure "would" (Exemption 6), or "could reasonably be expected to" (Exemption 7(C)), constitute an "invasion of personal privacy." Only if such an invasion would result is there a need to balance the privacy interest at stake against the public interest in disclosure to determine whether the invasion of privacy would be "unwarranted" or "clearly unwarranted."¹

Whether the disclosure of information would result in an "invasion of personal privacy" does not depend simply on whether an individual might prefer to limit circulation of the information to others. Under FOIA, as in other areas of the law, personal privacy is more than a subjective desire for secrecy. Information is private only when it is personal information of a type that is not ordinarily made public, and when there is a legitimate, objectively reasonable expectation that it will remain private.

Thus, this Court has emphasized that a subjective expectation of privacy is insufficient to create a privacy interest under the Fourth Amendment; there must be "a justifiable, a 'reasonable' or a 'legitimate expectation of privacy.'" *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (installation of pen register does not invade a legitimate expectation of privacy) (emphasis added).² Similarly,

¹ See, e.g., *Ripskis v. Department of Housing & Urban Dev.*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*per curiam*) (Exemption 6); *Ferri v. Bell*, 645 F.2d 1213, 1217 (3d Cir. 1981) (Exemption 7(C)), modified, 671 F.2d 769 (1982); *Getman v. NLRB*, 450 F.2d 670, 674 (D.C. Cir. 1971) (Exemption 6).

² See also, e.g., *California v. Greenwood*, 108 S. Ct. 1625, 1628-29 (1988) (there is no reasonable expectation of privacy as to garbage

there can be no civil liability for invasion of privacy unless facts concerning one's "private life" are disclosed, and "the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Restatement (Second) of Torts* § 652D (1977) (emphasis added). The same principles apply to FOIA's privacy exemptions.

The legislative history of FOIA demonstrates that Congress did not intend Exemptions 6 and 7(C) to apply to whatever information an individual might consider embarrassing. In enacting Exemption 6, Congress intended that there be "a balancing of interests between the protection of an individual's *private affairs* from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813 at 9 (emphasis added). Congress was concerned that "[s]uch agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files" that are "highly personal to the person involved," *ibid.* (emphasis added), and contain "intimate details," H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (emphasis added). Congress's concern was with unjustified invasions of reasonable and legitimate expectations of personal privacy.

The government places heavy reliance upon a reference in the 1966 House Report on FOIA to "those kinds of files the disclosure of which might harm the individual." *Ibid.* As this Court has noted, that reference suggests that the phrase "personnel and medical files and similar files" (emphasis added) was not intended "to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information." *United States*

bags left on the curb in front of one's home); *Hudson v. Palmer*, 468 U.S. 517, 525-26 & n.7 (1984) (a prisoner has no legitimate expectation of privacy in his prison cell).

Department of State v. Washington Post Co., 456 U.S. 595, 602 (1982). Any information the disclosure of which would constitute a "clearly unwarranted invasion of personal privacy" is exempt from disclosure under Exemption 6, without regard to the nature of the file in which the information appears. But it does not follow that Exemptions 6 and 7(C) were intended to apply to *any* information that might harm an individual. The harm that Congress addressed in these exemptions was an "invasion of personal privacy," nothing else.³ See Pet. App. 19a n.12.

As this Court recognized in *Department of the Air Force v. Rose*, Exemption 6 was intended to be a "limited exemption," applicable only "where privacy was threatened." 425 U.S. at 372. "Exemption 6 on its face is concerned with protecting personal privacy, and no more." *Washington Post Co. v. United States Department of Health & Human Services*, 690 F.2d 252, 260 n.23 (D.C. Cir. 1982). The same is true of Exemption 7(C).

In keeping with the statutory language and the legislative history, courts have consistently recognized that Exemptions 6 and 7(C) do not apply to information as to which there is no legitimate expectation of privacy. See, e.g., *Washington Post Co. v. United States Department of Health & Human Services*, 690 F.2d at 263; *International Brotherhood of Electrical Workers v. United States Department of Housing & Urban Development*, 593 F. Supp. 542, 544 (D.D.C. 1984), aff'd, 763 F.2d 435 (D.C. Cir. 1985); *National Western Life Ins.*

³ That Congress has recognized a distinction between an "invasion of personal privacy" and other types of personal harm is confirmed by Exemption 7(F), which applies to disclosures likely to "endanger the life or physical safety of any individual." 5 U.S.C. (Supp. IV) § 552(b)(7)(F). When Congress has intended to provide protection from personal harm other than an "invasion of personal privacy," it has made that intent clear.

Co. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980). Scholarly commentary has likewise underscored the need for an objective test of privacy under Exemption 6. See Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. Legal Studies 727, 752 (1980).

In sum, Exemptions 6 and 7(C) do not encompass any and all information that an individual might consider embarrassing. See also pages 27-28, *infra*. Whether release of the information sought by respondents would constitute an "invasion of personal privacy" depends upon whether there is a legitimate and reasonable expectation of personal privacy in criminal-history information that is a matter of public record.

II. THERE CAN BE LITTLE OR NO EXPECTATION OF PERSONAL PRIVACY AS TO CRIMINAL-HISTORY INFORMATION THAT IS A MATTER OF PUBLIC RECORD.

A. The Public Nature of Criminal-History Information

Disclosure of the information sought by respondents would not compromise any legitimate expectation of privacy. Convictions, sentences, indictments and arrests are fundamentally public, not private, matters. Moreover, respondents have sought only criminal-history information that is in fact a matter of public record.

The government largely ignores the question of how a criminal conviction, sentence, or indictment can reasonably be regarded as private, preferring to focus almost exclusively on arrests. Br. 33-37, 42. But arrests are only one of the categories of information sought in respondents' FOIA requests. With the exception of information on financial crimes, the government has refused to provide any category of information, including convictions, concerning Charles Medico—either by disclosing responsive information or by indicating that none exists.

1. Convictions and Sentences

There can be no justifiable expectation of personal privacy with respect to a criminal conviction and sentence. A crime is not a private wrong, but an offense against the public. It is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community." Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 405 (1958). That is precisely what a judgment of criminal conviction is—"a formal and solemn pronouncement of the moral condemnation of the community." By its very nature, then, a criminal conviction is not something that concerns an individual's private life; it involves the entire community.

Under no circumstances can a conviction be considered private—unless, perhaps, society has chosen to expunge it. The convicted criminal may wish that his conviction were secret, but that subjective desire hardly creates a justifiable expectation of privacy. As the *Restatement (Second) of Torts* (1977) notes: "Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed." Section 652D, Comment f. The Restatement makes clear, in fact, that the public's legitimate interest extends well beyond the fact of a conviction; it includes, at the very least, facts about an individual that might explain his criminal conduct. Section 652D, Comment h. The public's interest certainly extends to the conviction itself. "Once a person has been convicted of a crime he can have no legitimate expectation that the fact of his conviction will remain a private matter, shielded from public view." *Ferri v. Bell*, 1 Gov't Disclosure Cases (P-H) ¶ 79,206 at 79,387 (M.D. Pa. 1979), *rev'd as to other records*, 645 F.2d 1213 (3d Cir. 1981), *modified*, 671 F.2d 769 (1982).*

* In *Ferri* the government did not appeal the district court's ruling ordering disclosure of conviction records under FOIA.

Chief Justice Rehnquist made essentially this point in a 1974 lecture:

I would think that if one carries the principles of privacy advocated [with respect to disclosure of criminal-record information to employers] to their ultimate extreme, which I suppose would mean sealing records of actual criminal convictions which had taken place in open court, we would see the claim of privacy competing not merely with the claim of fair and effective law enforcement, but the claim of the citizenry to be fully informed about what is going on about them. The trend of recent legislation has been to open up governmental activities to public inspection and to permit public access to many kinds of government records that were formerly thought to be confidential. If this trend is wise and desirable in every other area, it seems to me that it would take a far stronger claim of privacy than any that I have heard made to require that the exact opposite result be reached in the case of actual criminal conviction.⁶

The undeniable reality is that criminal prosecutions and convictions have never been regarded as private or secret. In *Cox Broadcasting Corp. v. Cohn*, this Court declared that “[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecution . . . are without question events of legitimate concern to the public . . .” 420 U.S. at 492. In *In re Oliver*, 333 U.S. 257 (1948), the Court said it was “unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.” *Id.* at 266 (footnote omitted).

⁶ Justice William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, Part I, p. 19 (Sept. 26-27, 1974) (emphasis added).

The tradition of opening criminal proceedings to the public is so well established that this Court has held that the public has a right of access to criminal proceedings under the First Amendment. See *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).⁷ And one of the reasons for recognizing a constitutional right of access to criminal proceedings is that the public has an interest in knowing that those who commit crimes are convicted and punished. See *Richmond Newspapers, Inc.*, 448 U.S. at 571.

The tradition of public access is not limited to criminal proceedings themselves; convictions and sentences are documented in court files and remain matters of public record in all jurisdictions. See Search Group, Inc., Bureau of Justice Statistics, *Privacy and Security of Criminal History Information: Privacy and the Media* 17 (1979) (hereafter cited as “*Criminal History Information*”). The universal practice of making such information freely accessible to the public reflects the common understanding that convictions and sentences are public matters. See *Cox Broadcasting*, 420 U.S. at 495 (“By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.”).⁸

The fundamental nature of a criminal conviction as a formal public statement of condemnation, the public in-

⁷ Even when legitimate privacy concerns of witnesses or jurors are involved, the public may be excluded from criminal proceedings only upon a specific finding of a compelling interest that cannot be adequately protected in some other way. See *Press-Enterprise Co.*, 464 U.S. at 511-12; *Globe Newspaper Co.*, 457 U.S. at 606-07.

⁸ This understanding is also shown by the practice of many newspapers of printing lists of convictions and sentences on a regular basis. No one would suggest for a moment that the publication of such lists constitutes an invasion of privacy.

terest in seeing that wrongdoers are convicted, the historic openness of criminal proceedings, and the fact that convictions and sentences are almost always a matter of public record—all of these factors constitute powerful evidence that there is no legitimate expectation of personal privacy as to criminal convictions and sentences.

2. Indictments

There is likewise no personal privacy interest in information indicating that an individual was indicted for committing a criminal offense. An indictment is a formal accusation of criminal conduct. It must be approved by grand jurors drawn from the community. And it charges a serious offense; minor offenses are prosecuted by information. See 2 W. LaFave & J. Israel, *Criminal Procedure* § 15.1 at 278-79 (1984).

An individual who has been indicted has a right to expect that he will be accorded a fair trial. He has no right, however, to expect that his indictment will be kept secret. He has been formally charged with committing a crime pursuant to the procedure established by society for initiating the prosecution of serious offenses. Far from being a private matter, such a charge is a matter of legitimate public concern.

The courts have repeatedly recognized that the strong public interest in criminal prosecutions is not limited to convictions and sentences, and that the public also has a strong interest in learning about the filing of criminal charges. See, e.g., *FDIC v. Mallen*, 108 S. Ct. 1780, 1790 (1988); *United States v. Smith*, 776 F.2d 1104, 1112 (3d Cir. 1985); *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975). That a grand jury has found probable cause to believe a serious offense was committed is a matter of substantial and legitimate interest to the public.

The public nature of indictments is also reflected in the requirement that they be returned in open court except in

extraordinary circumstances. Rule 6(f) of the Federal Rules of Criminal Procedure provides: "The indictment shall be returned by the grand jury to a federal magistrate in open court." (Emphasis added.) And this Court has declared that "[c]riminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused . . ." *Post v. United States*, 161 U.S. 583, 587 (1896) (emphasis added). Returning an indictment in open court is not simply a modern procedure; it was a basic requirement at common law that an indictment be "publicly delivered into court." 4 W. Blackstone, *Commentaries* *301; see *Renigar v. United States*, 172 F. 646, 648 (4th Cir. 1909).

After an indictment has been returned, it almost invariably becomes a matter of public record. See *Criminal History Information*, *supra*, at 17. Indeed, there is an "historic tradition of public access to the charging document in a criminal case," which "reflects the importance of its role in the criminal trial process and the public's interest in knowing its contents." *United States v. Smith*, 776 F.2d at 1112; see also *Cox Broadcasting*, 420 U.S. at 496.

As with a conviction, then, there can be no justifiable expectation of privacy with respect to an indictment.

3. Arrests

Arrests are also public matters. As Chief Justice Rehnquist emphasized in his 1974 lecture concerning privacy:

An arrest is not a "private" event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch

even the broadest definitions of the idea of privacy beyond the breaking point.*

The fact that the police believe a crime has been committed and have formally acted on that belief is a public, not a private, matter. An arrest is a formal, official act reflecting the conclusion that there is probable cause to believe an individual has committed a crime.

An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.

Terry v. Ohio, 392 U.S. 1, 26 (1968) (footnote omitted). The significance of an arrest is evident from the rule that an arrest justifies a complete search of the person. See *United States v. Robinson*, 414 U.S. 218 (1973). If the police have probable cause to believe an individual has committed a crime and formally act on that belief, that is a fact of genuine interest to the community. See, e.g., *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. at 1321.

In *Paul v. Davis*, 424 U.S. 693 (1976), this Court stressed the official nature of an arrest in holding that the deliberate dissemination of information concerning an arrest does not amount to an unconstitutional invasion of privacy. The Court noted that Davis's "claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest." *Id.* at 713.*

* Rehnquist, *supra*, Part I, at 12-13 (emphasis added).

* In its *amicus curiae* brief, the American Civil Liberties Union ("ACLU") incorrectly states that *Paul v. Davis* recognized a right

The public nature of arrests is also evident from the fact that in the vast majority of jurisdictions arrest books and police blotters are open to the public by law or long-standing tradition. See, e.g., *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976); D.C. Code §§ 4-131(4), 4-135 (1988 Repl. Vol.). See generally *Criminal History Information, supra*, at 17. Secret arrests are odious to a democratic society, and that is one of the reasons arrests traditionally have been regarded as public in this country. See, e.g., S. Rep. No. 1775, 83d Cong., 2d Sess. 1 (1954); H.R. Rep. No. 2332, 83d Cong., 2d Sess. 1 (1954).¹⁰

The public nature of an arrest is not altered by the fact that a conviction did not result or, for that matter, the fact that the arrest itself was not justified. Questions of fairness may arise when employers rely upon bare arrest records. But those questions may be addressed by educating employers about the unfairness of

to recover for harm from disclosure of an arrest record "in some circumstances." ACLU Br. 17, citing 424 U.S. at 701. In fact, the Court did not recognize a right to such recovery under any circumstances. The ACLU's reliance on a footnote in the dissent is equally misplaced. ACLU Br. 17-18. That footnote only dramatizes the fact that the Court's opinion treated arrests in a manner completely incompatible with those state and lower federal court decisions that had suggested that arrest records implicate a privacy interest.

¹⁰ In considering the ACLU's arguments about arrests, the Court should bear in mind that the ACLU does not accept the widely followed practice of making arrest books and police blotters available to the public. The ACLU has carried its concerns about improper use of arrests by employers to the point of asserting that arrest records should not be publicly available even at their source. See, e.g., *Dissemination of Criminal Justice Information: Hearings on H.R. 188, H.R. 9783, H.R. 12574, and H.R. 12575 Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 78, 92-93 (1973) (testimony of Aryeh Neier, Executive Director of the ACLU) (hereafter "House Criminal Justice Hearings"). Having failed to gain acceptance of that position, the ACLU is now attempting to stretch Exemptions 6 and 7(C) to reach arrests.

relying upon such records, *see Rehnquist, supra*, Part I at 19, or by enacting legislation that restricts reliance upon arrests in employment decisions. Those questions do not transform fundamentally public information into private information protected by Exemptions 6 and 7(C). They certainly do not confer a legitimate expectation of personal privacy upon those who, like Charles Medico, seek the award of lucrative defense contracts.

In *Tennessean Newspaper, Inc. v. Levi*, the district court held that Exemption 7(C) did not encompass the age, address, marital status, or employment status of persons who have been arrested or indicted; the circumstances of an arrest; the scope of the investigation leading to an arrest or indictment; or other background material. 403 F. Supp. at 1320-21. Here, respondents have sought only an identification of any arrests of Charles Medico; they have not requested underlying details or background information. And any conceivable privacy interest is diminished, if not eliminated altogether, by the fact that respondents seek only information that is a matter of public record.

B. The Public-Record Status of the Information Sought in This Case

As demonstrated above, convictions, sentences, indictments, and arrests are generally matters of public record because they are intrinsically matters of public concern. That they may in extraordinary cases be sealed or expunged need not concern the Court in this case, for this FOIA suit has been limited expressly to criminal-record information that is in fact a matter of public record. J.A. 33. If Charles Medico was convicted, for example, and the official record of the conviction was later sealed or expunged, information reflecting that conviction is beyond the scope of respondents' complaint. Respondents seek no more than members of the public could obtain from court files or police records if they but knew which records to check.

Whatever may be said of criminal-record information that has been expunged or otherwise removed from the public domain, there clearly is no substantial personal privacy interest when such information remains a matter of public record. As a general matter, the fact that information is already a matter of public record is itself a strong indication that there is no legitimate expectation of personal privacy. The *Restatement (Second) of Torts* states that "there is no liability [for invasion of privacy] for giving publicity to facts about the plaintiff's life that are matters of public record." § 652D, Comment b. Following that principle, courts have routinely rejected invasion-of-privacy claims based on the disclosure of public-record information.¹¹

In *Cox Broadcasting*, this Court concluded that even the victim of a crime has no substantial privacy interest in information contained in an indictment that is a matter of public record, because "the prevailing law of invasion of privacy generally recognizes that *the interests in privacy fade when the information involved already appears on the public record.*" 420 U.S. at 494-95 (emphasis added). *A fortiori*, a person arrested, indicted, or con-

¹¹ See, e.g., *Valentine v. C.B.S., Inc.*, 698 F.2d 430, 432-33 (11th Cir. 1983); *McNally v. Pulitzer Pub. Co.*, 532 F.2d 69, 78 (8th Cir. 1976); *Thompson v. Curtis Publishing Co.*, 193 F.2d 953 (3d Cir. 1952); *Singer v. Bell*, 613 F. Supp. 198, 204 (S.D.N.Y. 1985); *Bergman v. Stein*, 404 F. Supp. 287, 296 (S.D.N.Y. 1975); *Frith v. Associated Press*, 176 F. Supp. 671, 674 (D.S.C. 1959); *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1118-19 (Md. App. 1986), cert. denied, 107 S. Ct. 571 (1986); *Sparks v. Thurmond*, 171 Ga. App. 138, 319 S.E.2d 46, 50 (1984); *Montesano v. Donrey Media Group*, 668 P.2d 1081, 1084-86 (Nev. 1983), cert. denied, 466 U.S. 959 (1984); *Kilgore v. Younger*, 30 Cal. 3d 770, 640 P.2d 793, 797, 180 Cal. Rptr. 657 (1982) (in bank); *Baker v. Burlington Northern, Inc.*, 99 Idaho 688, 587 P.2d 829, 832-33 (1978); *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84, 88 (Ky. 1966); *Hubbard v. Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147, 148-49 (1962); *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606, 610 (1956).

victed for committing a crime has no significant privacy interest in public-record information reflecting those official actions.¹²

The government's attempt to explain away *Cox Broadcasting* cannot withstand scrutiny. The government states:

The rationale of *Cox Broadcasting* . . . was not . . . that the public availability of information somehow renders any remaining privacy interest in that information insignificant. Rather, this Court recognized that it was dealing with a "sphere of collision between claims of privacy and those of the free press," with legitimate interests to be considered on both sides (420 U.S. at 491).

Br. 21 n.5. In fact, however, the Court put to one side "the broader question" whether a state may "define and

¹² *Amici curiae Search Group, Inc. et al.* (hereafter "Search") suggest that

not all of the types of information included in a rap sheet are publicly available from their original sources. For example, correctional information customarily is not publicly available from the jail or correctional institution that is the source of the data. Similarly, charging information is generally not publicly available from the prosecutorial agency that is the source of the data.

Br. 22. This attempt to obfuscate matters should be disregarded. Respondents have made clear from the time they filed their complaint that they seek only the particular categories of criminal history information identified, and only information that is a matter of public record. J.A. 33. All parties have understood throughout that that is the only information at issue. Thus, when the government disclosed records concerning Phillip Medico, it selected information that did not fall within the discrete categories of information sought. *Id.* at 117-19. Furthermore, the only "charging information" sought—information about indictments—is publicly available in court files. See page 17, *supra*. Whether it is available "from the prosecutorial agency" is totally irrelevant. The only "correctional information" sought—information about sentences—is also routinely a matter of public record as part of judgments of conviction.

protect an area of privacy free from unwanted publicity in the press." 420 U.S. at 491. It was unnecessary to decide that broader question precisely because the public-record status of the information meant that no substantial privacy interest was at stake. *Id.* at 494-95.¹³

Numerous decisions under FOIA have recognized that in general there can be little or no privacy interest in matters of public record. For example, in *Deering Milliken, Inc. v. Irving*, 548 F.2d 1131 (4th Cir. 1977), the court found only a "minimal" privacy interest in information which "is, or will be, part of the public record" in an NLRB proceeding. *Id.* at 1136. Similarly, in *Congressional News Syndicate v. United States Department of Justice*, 438 F. Supp. 538 (D.D.C. 1977), the court assigned little weight to the alleged privacy interest in po-

¹³ The government argues that "at the time Congress enacted Exemption 7(C), there was substantial support for the notion that publication of old conviction records could be an actionable invasion of privacy. See *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971)." Br. 21 n.5. *Briscoe*, the only case cited by the government, was contrary to the overwhelming weight of authority existing in 1974. This Court recognized as much in *Cox Broadcasting*, which was handed down less than four months after the enactment of Exemption 7(C). The Court was fully aware of *Briscoe*, see 420 U.S. at 475, but expressly concluded that "*the prevailing law of invasion of privacy* generally recognizes that the interests in privacy fade when the information involved already appears on the public record." *Id.* at 494-95 (emphasis added). Because the government simply has not shown that this Court mischaracterized the state of the law, *Briscoe* provides not the slightest basis for suggesting that Congress intended that Exemption 7(C) cover old conviction records. On the contrary, the numerous pre-1974 decisions rejecting invasion of privacy suits based on the disclosure of public-record information, see note 11, *supra*, underscore how unlikely it is that either Exemption 7(C) or Exemption 6 (since many of the relevant cases were decided prior to 1966) was intended to cover such matters. See *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (it is appropriate to assume that members of Congress know the law).

litical contributions that were required to be publicly reported. As the court explained, "the Federal Corrupt Practices Act disclosure requirements strip contributors and recipients equally of whatever cloak of privacy their relationship would have had in the statute's absence." *Id.* at 543 (citation omitted).¹⁴

United States Department of State v. Washington Post Co., 456 U.S. 595 (1982), is in no way inconsistent with these decisions. The only issue decided in that case was the meaning of the phrase "similar files" in Exemption 6. The court of appeals had interpreted it to require a threshold showing that information be as highly personal or as intimate as information in "personnel and medical files." See *id.* at 598. This Court granted certiorari "to review the Court of Appeals' construction of the similar files language," *ibid.*, and held that all records concerning identifiable individuals constitute "similar files," *id.* at 602. The Court did not decide whether the disclosure sought would constitute an invasion of personal privacy or, if so, whether that invasion would be

¹⁴ Accord, *Akron Standard Division of Eagle-Picher Industries, Inc. v. Donovan*, 780 F.2d 568, 573 (6th Cir. 1986) (Exemption 7(C) held inapplicable to documents concerning job performance of employee allegedly fired in retaliation for filing safety complaint and engaging in union activities; the employee's job performance had been fully explored in public agency proceedings); *Radowich v. United States Attorney*, 501 F. Supp. 284, 288 (D. Md. 1980) ("[I]t is not clear that any meaningful concern over personal privacy can exist with regard to this information, when so much of it has already been made public during the past several years."), *rev'd on other grounds*, 658 F.2d 957 (4th Cir. 1981); *Associated General Contractors v. Environmental Protection Agency*, 488 F. Supp. 861, 863 (D. Nev. 1980) (blanket denial of access to personnel data of government employees, where "[m]ost of such information [was] a matter of public record somewhere," held sufficiently unreasonable to justify the award of attorney's fees); *Information Acquisition Corp. v. Department of Justice*, 444 F. Supp. 458, 464 (D.D.C. 1978) (fact that prosecutors' appointment status was generally a matter of public record made it "difficult to understand" how disclosure could constitute an invasion of privacy).

clearly unwarranted. It left those questions to be decided on remand. *Id.* at 602-03.¹⁵

Contrary to what the government suggests, Br. 32, the Court did not state that the public-record status of citizenship could not be decisive in "the weighing of interests to be conducted" on remand. The Court concluded only that the public-record status of that information was not decisive of whether the documents were "similar files." As the Court noted, "personnel and medical files" also include public-record information. 456 U.S. at 602-03 n.5. The Court expressly recognized, however, that "[t]he public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a clearly unwarranted invasion of personal privacy'" *Ibid.*¹⁶

¹⁵ If anything, the Court's opinion highlights the importance of the phrase "clearly unwarranted invasion of personal privacy" as a limitation on the reach of Exemption 6. The Court concluded that the phrase "similar files" should be broadly construed because the phrase "clearly unwarranted invasion of personal privacy" was intended to "hold[] Exemption 6 'within bounds.'" 456 U.S. at 600 (citation omitted).

The courts have applied a three-part test under Exemption 6. To withhold documents under the exemption, the agency must establish (1) that they constitute personnel or medical or similar files, (2) that disclosure would constitute an invasion of privacy, and (3) that the invasion would be clearly unwarranted. See, e.g., *Ripskis v. Department of Housing and Urban Dev.*, 746 F.2d at 2-3; *Washington Post Co. v. United States Dep't of Health and Human Services*, 690 F.2d at 260-61. The first prong of this test, the only one at issue in *United States Department of State v. Washington Post Co.*, is not at issue here.

¹⁶ Respondents need not quarrel with Professor Keeton's statement, relied on by the government, Br. 21, that "merely because [a fact] can be found in a public record, does not mean that it should receive widespread publicity if it does not involve a matter of public concern." W.P. Keeton, *Prosser and Keeton on The Law of Torts* 859 (5th ed. 1984). There may be matters that are re-

The government argues that criminal-record information in court files and police records may be difficult to locate, Br. 19, but an individual's interest in maintaining difficulty of access to such information does not make that information private. The focus of FOIA is on information,¹⁷ and the information is the same when it is reflected in publicly available documents in the source jurisdiction as it is when it is incorporated in the FBI's files. Collecting the information in a different place does not somehow transform it into private data.¹⁸

flected in some public records that could properly be withheld if sought from a federal agency under FOIA. Here, however, the claimed interest in privacy is not only undermined by the fact that the information sought "can be found" in a public record. The information is systematically and routinely made a matter of public record in virtually all jurisdictions and, as demonstrated above, is inherently a "matter of public concern." *Ibid.*

¹⁷ See *FBI v. Abramson*, 456 U.S. 615, 626 (1982) ("in determining whether information in a requested record should be released, the Act consistently focuses on the nature of the information and the effects of disclosure") (emphasis added).

¹⁸ This Court has recognized that when the police use modern technology to obtain information that they could obtain through surveillance from public places, no legitimate expectation of privacy is invaded, since the information was publicly disclosed in any event. In *United States v. Knotts*, 460 U.S. 276 (1983), the Court held that it was irrelevant that the police used a beeper to track an automobile, in addition to visual surveillance from public places:

The fact that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of Petschen's automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Id. at 282. It is likewise irrelevant that respondents seek to obtain information that modern technology now allows to be stored and easily accessed in computers. As in *Knotts*, the information is public in any event, and modern technology has affected only the means of obtaining the information, not the nature of the information.

The weakness of the government's argument that criminal-history information is private is illustrated by its own preferred definition of privacy. Privacy, the government asserts, is "the claim of individuals * * * to determine for themselves when, how, and to what extent information about them is communicated to others," and the individual's "right to control dissemination of information about himself." Br. 20 (citations omitted). As a general matter, however, an individual clearly has no right to "determine for [himself]" or "to control" whether his criminal conviction, sentence, indictment or arrest should be known to others. The government's reliance on these definitions only serves to highlight how incongruous it is to suggest that convictions, sentences, indictments and arrests are private matters. Particularly in light of the principle that "FOIA exemptions are to be narrowly construed," *United States Department of Justice v. Julian*, 108 S. Ct. 1606, 1611 (1988); see *Department of the Air Force v. Rose*, 425 U.S. at 361, the government's position is wholly untenable.

C. Factors Cited by the Government as Creating a Substantial Interest in Personal Privacy

The government cites several factors that purportedly could give rise to a substantial privacy interest in criminal-record information: the potential for embarrassment, the lack of notoriety of the criminal proceedings, the passage of time, and the fact that the individual involved now lives far from where the proceedings occurred. Br. 33-34. None of these factors establishes the existence of a legitimate expectation of personal privacy.

1. The mere fact that criminal-record information is "derogatory," *id.* at 33, and that its disclosure may be embarrassing, *id.* at 34, does not make it private. As noted above, the very purpose of a criminal conviction is to condemn the defendant for violating the law. Information reflecting such a condemnation is obviously de-

rogatory and embarrassing. It scarcely follows, however, that there can be a reasonable expectation that the condemnation will be kept secret.

There are many facts that would be embarrassing but are not in the least private. A government official who used public funds to pay personal expenses would undoubtedly be embarrassed by the revelation of such misconduct, but no one would suggest that the revelation was an invasion of privacy. Similarly, an American citizen who sold classified information to a foreign power would surely be embarrassed by the disclosure of his actions, but again there would be no invasion of privacy. As the court of appeals noted, the government's attempt to equate embarrassment with an invasion of privacy "proves too much. Virtually any unflattering information, even already well-distributed in the public domain, may cause further embarrassment when reintroduced." Pet. App. 19a.

Unlike *United States Department of State v. Washington Post Co.*, this case does not involve a claim that release of the requested information would subject anyone to a "real threat of physical harm," 456 U.S. at 597, or to any particular harm at all. Indeed, the court of appeals specifically stated: "had it been shown to us that disclosure of Medico's 'rap sheet' would cause him particular harm, . . . we might well have reached a different conclusion." Pet. App. 40a. There was no such showing, and the theoretical possibility that some particular harm could result is clearly insufficient to make Exemption 6 or Exemption 7(C) applicable. See, e.g., *Department of the Air Force v. Rose*, 425 U.S. at 380 n.19 ("The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities.").

2. Lack of notoriety likewise does not establish the existence of a substantial privacy interest. A criminal conviction or charge that received little notice at the time

may become a matter of great interest to the public in light of later events. The absence of prior publicity scarcely gives the defendant a right to insist that the matter not be discussed when it becomes newsworthy.

3. That time has passed, or that an individual now lives a great distance from where the crime or the criminal proceeding occurred, does not create a privacy interest. Again, such facts concern only the likelihood that a person's current acquaintances know about his criminal record; they have no bearing on whether he can justifiably expect to keep them from hearing about it.

As a general matter, the publication of facts that are of legitimate public concern—including criminal convictions—does not constitute an actionable invasion of privacy simply because a considerable period of time has passed since the events in question occurred. In *Montesano v. Donrey Media Group*, 668 P.2d 1081 (Nev. 1983), cert. denied, 466 U.S. 959 (1984), for example, a newspaper article concerning the recent murder of a Las Vegas policeman recounted the history of Las Vegas police officers who had been killed in the line of duty, and described the plaintiff's hit-and-run conviction arising from an accident in which a policeman had been killed more than 20 years earlier, as well as his conviction for possession of marijuana, which was almost as old. The court found no invasion of privacy, because the information was a matter of public record and was relevant to a subject of public interest.¹⁹

The criminal process itself takes note of an individual's past criminal record at numerous stages, including the

¹⁹ Accord, *Estill v. Hearst Publishing Co.*, 186 F.2d 1017, 1022 (7th Cir. 1951); *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940); *Rawlins v. Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988, 993-96 (1975); *Barbieri v. News-Journal Co.*, 56 Del. 67, 189 A.2d 773, 775 (1963); *Smith v. Doss*, 251 Ala. 250, 37 So.2d 118, 121 (1948).

investigation, arrest, decision to charge, plea bargaining, pretrial release and bail decisions, and sentencing.²⁰ All entries on an individual's record may be taken into account, regardless of whether a conviction resulted or when the events occurred.

Past convictions, sentences, indictments and arrests are also considered in a broad range of contexts outside the criminal justice system, regardless of when they occurred.

[C]riminal history records are widely used for noncriminal justice purposes. Information contained in these records, for example, may be available to federal agencies for federal employment and security clearance determinations; to federal and state agencies for licensing decisions; to public and private employers for employment decisions; and to a countless variety of private sector decisionmakers for use in insurance, credit, housing and other important decisions.²¹

When criminal-history information is used for such purposes, a time limit is seldom imposed. The Department of Justice's own regulations allow recipients of Law Enforcement Assistance Administration ("LEAA") grants for criminal-history record systems to disclose even non-conviction data, without any time limit, for any purpose authorized by any state or local statute, ordinance, executive order, or court order. 28 C.F.R. § 20.21(b) (2)

²⁰ See, e.g., *Michelson v. United States*, 335 U.S. 469 (1948) (27-year-old arrest may be inquired of in cross-examination of a character witness); *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir.), cert. denied, 108 S. Ct. 350 (1987); *Russell v. United States*, 402 F.2d 185, 187 (D.C. Cir. 1968); *Rhodes v. United States*, 275 F.2d 78, 82 (4th Cir. 1960); *State v. Nolan*, 316 S.W.2d 630, 633-34 (Mo. 1958). See generally Search Group, Inc., Bureau of Justice Statistics, *Criminal Justice Information Policy: Data Quality of Criminal History Records* 13-15 (1985) (hereafter "Data Quality").

²¹ *Data Quality*, *supra*, at 12 (footnote omitted).

1987.²² Those regulations impose no restrictions on dissemination of conviction data—to ensure that such data "could continue to be disseminated routinely." 28 C.F.R. Part 20, App., p. 305 (1987).

The FBI itself broadly disseminates criminal-history information for use in connection with licensing, employment, and other non-criminal-justice decisions. See 28 C.F.R. § 20.33(a)(2)-(3) (1987). In fiscal year 1983 alone, the FBI's Identification Division performed approximately 3 million criminal-record searches for federal and state agencies outside the criminal justice system, for federally chartered banks and for the securities and commodity futures industries.²³ The only time limit imposed is that arrest data unaccompanied by information as to the disposition of the arrest will not be disseminated for use in non-federal licensing or employment decisions if the arrest is more than one year old and no active prosecution of the charge is known to be pending. *Id.* § 20.33(a)(3). Even that time limit does not apply to disclosures to federal agencies or to criminal justice agencies, and no time limit of any kind is imposed on dissemination of any nonarrest data or arrest data accompanied by dispositions.

The fact is that the Department of Justice has created facilities for the very purpose of gathering criminal-record information, retaining it indefinitely, and distrib-

²² "[S]ome states authorize the use of criminal records for any occupational licensing or employment purpose . . ." Search Group, Inc., *A Study To Identify Criminal Justice Information Law, Policy and Management Practices Needed To Accommodate Access to and Use of III for Noncriminal Justice Purposes* 18 (unpublished monograph for the FBI, 1984) (hereafter "Noncriminal Justice Purposes") (emphasis added).

²³ See *Noncriminal Justice Purposes*, *supra*, at 3, 23. For example, under § 3(a) of Executive Order No. 10,450, 3 C.F.R. 936 (Comp. 1949-53), a check of the FBI's criminal-history files is required as part of the background investigation conducted with respect to all federal employees.

uting it for use both inside and outside the criminal justice system. The Department itself has concluded that individuals have no right to keep their criminal records secret simply because a period of years has passed.

That judgment is consistent with the judgment of the community. Individuals are often required to disclose their own criminal records without a time limit being imposed. For example, an employer generally has every right to ask a job applicant to disclose his criminal record, including any arrests.²⁴ The numerous contexts in which the government discloses criminal-history information and in which individuals are themselves required to disclose such information, without a time limit being imposed, demonstrate that the mere passage of time does not make criminal-history information private.²⁵

²⁴ See Rehnquist, *supra*, Part I, at 19. If a person's criminal record includes a felony conviction, that fact is not only subject to disclosure in a wide range of circumstances regardless of how old the conviction is, *see, e.g.*, Administrative Office of the United States Courts, *Juror Qualification Questionnaire*, AO-178D (Rev. Aug. 1986); Office of Personnel Management, *Application for Federal Employment—Standard Form 171* (Rev. Feb. 1984); it is itself often a basis for permanent exclusion from government employment and from employment in various professions and occupations, *see Carafas v. La Valle*, 391 U.S. 234, 237 & n.4 (1968); *De Veau v. Braisted*, 363 U.S. 144, 158-59 (1960) (plurality opinion), and for permanent disenfranchisement unless the governor or a special commission specifically restores the individual's civil rights, *see A. Reitman & R. Davidson, The Election Process: Law of Public Election Campaigns* 18 (1980).

²⁵ That "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information," *Rose v. Department of the Air Force*, 495 F.2d 261, 267 (2d Cir. 1974) (footnote omitted), *aff'd*, 425 U.S. 352 (1976), quoted at Gov't Br. 31, scarcely suggests that information which is public in nature, a matter of public record, and subject to disclosure in many contexts becomes private merely because time has passed since the events in question. *Rose* involved a totally different situation. The information at issue in *Rose* concerned Honor Code and Ethics Code violations by cadets at a military academy, not criminal conduct;

The passage of time surely does not create any legitimate expectation of privacy in this case. The Medicos chose to seek lucrative defense contracts, and in doing so invited scrutiny of their fitness. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), this Court specifically held that "a charge of criminal conduct, *no matter how remote in time or place*, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co. v. Sullivan*." *Id.* at 277 (emphasis added). Similarly, when a company has received government contracts with the help of a Congressman under investigation for conflict of interest and corruption, evidence that a principal of the company was arrested, charged or convicted for committing a crime can never be irrelevant to the company's fitness.²⁶

was available only within the military academy; was redacted in all not-guilty and discretion cases to protect the identity of the cadet; and even in guilty cases was not made available until after the guilty cadet had left the academy.

²⁶ Search cites another factor purportedly creating a privacy interest: the risk that the records disclosed will not relate to the subject of the request. Br. 62. It suggests that the opinion below would force the Department of Justice "to provide criminal history records to the public solely on the basis of a record subject's name, and without benefit of a record subject's fingerprints, or even biographical data or other descriptions." *Ibid.* This is pure speculation and is unfair to the court of appeals. Nothing in the court of appeals' opinion prevents the Department from insisting on information adequate to identify the subject of the request. When insufficient identifying information has been provided, the Department is fully capable of saying so. Indeed, in this very case the FBI told the Reporters Committee it needed more information to perform an accurate search for records concerning William Medico, J.A. 55—even though his rap sheet had already been located and disclosed to Schakne, *id.* at 51.

[Continued]

D. The Government's Arguments Based on the "Legislative Background" of Exemption 7(C)

Unable to find anything in the legislative history of FOIA to suggest that Congress intended to exempt publicly available criminal-record information from disclosure, the government resorts to a variety of other materials, including congressional hearings held in the early 1970s, the legislative history of a 1973 statute governing LEAA grants, and the Privacy Act, 5 U.S.C. § 552a. Br. 24-30. The government argues that these materials demonstrate that Exemption 7(C), which was enacted in 1974, was intended to cover criminal-record information. In fact, they demonstrate nothing of the kind.

1. It is remarkable that the government would rely on statements made in support of federal legislation proposed in the early 1970s that would have restricted dissemination of criminal-record information. Br. 25-27. If such legislation had been enacted, the information at issue here would be exempted from disclosure by statute under Exemption 3. But the proposed legislation was not approved, and the government has abandoned the claim that the information at issue is exempted by statute. What the government seeks to accomplish here is the judicial

²⁶ [Continued]

The ACLU appears to suggest that a privacy interest is created by the fact that some criminal-history information collected by the Department of Justice is inaccurate or incomplete. Br. 12. The short answer is that the Department's data should obviously be as accurate and complete as possible, but concerns on that score cannot be equated with a legitimate expectation of privacy. Virtually any agency record could contain significant errors or omissions, but such potential shortcomings do not create an interest in privacy. Moreover, preventing access to the Department of Justice's files under FOIA would have the unfortunate effect of restricting public oversight of the actions taken by the Department to make its files accurate and complete.

enactment of restrictions that were considered but not enacted by Congress.

Even when legislation considered at congressional hearings is enacted, statements made at the hearings are often unreliable evidence of congressional intent. See, e.g., *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-94 (1931). When, as in this case, the statute in question—FOIA—was not given “any attention” at the hearings, Gov't Br. 26 n.12, and the legislation that was considered never became law, the statements provide no evidence whatsoever of congressional intent.²⁷

2. Equally misplaced is the government's reliance on the legislative history of 42 U.S.C. (& Supp. III) 3789g

²⁷ Even if the cited hearings were relevant, an examination of them demonstrates that there was no consensus that criminal-record information should be treated as private. For example, in the House subcommittee hearings cited by the government, Representative McClory opposed restrictions on dissemination of arrest records. He specifically noted that organized-crime figures “seem to be successful in obtaining favorable dispositions of their cases . . . particularly because they have very effective ties with the judiciary or other public officials.” *House Criminal Justice Hearings* 84. Moreover, Attorney General Saxbe asserted that any state or municipality that chose to consider criminal-record information in making licensing decisions, even with respect to barbers or taxi-cab drivers, should be allowed to obtain such information from the Department of Justice if there is a state statute authorizing such access. *Id.* at 221-22. He stressed that “[w]e are dealing with public records,” *id.* at 222, and that it is better for states and municipalities to obtain properly assembled and updated information than to force them to “go and search the dockets at the courthouse.” *Id.* at 221. See also, e.g., *Criminal Justice Data Banks—1974, Hearings on S. 2542, S. 2810, S. 2963, and S. 2964 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. pt. 1 at 404 (1974) (testimony of Harold W. Andersen, President, Omaha World-Herald, and Vice Chairman, American Newspaper Publishers Association) (“Certainly when a citizen is arrested, tried and convicted and sentenced, the entire series of events, the entire transaction, if you will, is a public matter.”).

(b), which concerns LEAA grants to state and local governments for criminal-history record systems. The government asserts:

In the legislative history of that provision, Congress referred to "the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemination of criminal justice information."

Br. 27-28, quoting S. Conf. Rep. No. 349, 93d Cong., 1st Sess. 32 (1973). By quoting a fragment of the Senate Conference Report out of context, the government has distorted the meaning of the Report. The relevant portion of the Report reads:

The conferees accepted the Senate version but only as an interim measure. *It should not be viewed as dispositive of the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemination of criminal justice information.* More comprehensive legislation in the future is contemplated.

(Emphasis added). The conferees went out of their way to dispel any notion that the legislation resolved whether criminal-justice information is private, and to explain that further legislation would be necessary to address that issue. There has, of course, been no further legislation.

3. The government also errs in arguing that the Privacy Act demonstrates that the term "privacy" in Exemption 7(C) was intended to encompass criminal-history information maintained by the federal government. Br. 30. In citing the provision allowing agencies to exempt criminal history records from most of the requirements of the Privacy Act (5 U.S.C. § 552a(j)(2)(A)), including the right of access by the subject of the records, Br. 30 n.18, the government is attempting to resurrect in another form the discredited contention that materials exempt from disclosure under the Privacy Act are also exempt under FOIA. The Department of Justice took this

position in amended regulations adopted in March 1984. 49 Fed. Reg. 12248, 12252 (1984). Later that year, however, Congress "specifically reject[ed] the interpretation set forth . . . in the new Justice Department regulations."²⁸ It adopted an amendment to the Privacy Act providing that "[n]o agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under [FOIA]."²⁹

The legislative history of this amendment reveals Congress's unequivocal rejection—specifically with reference to law enforcement records—of any suggestion that the exemption of records from the Privacy Act's requirements supports a claim of exemption under FOIA:

The [Privacy Act's] exemptions are . . . different than the exemptions of the FOIA because the Privacy Act has different purposes. For example, some criminal law enforcement records can be exempted from the Privacy Act's access provision. The Privacy Act also permits these records to be exempted from the provision permitting amendment of records. Exemptions also cover many other of the Act's requirements. *The exemptions do not serve the same purpose as the exemptions of the FOIA.*

Since the Privacy Act is not exclusively an access law, there is no reason why its exemptions should be read to have the same effect as the exemptions of the FOIA. . . . *There are perfectly rational reasons why access to a record may be allowed under the FOIA when access to the same record is denied under the Privacy Act.*

Access to records under the Privacy Act normally entails a corresponding opportunity to seek amend-

²⁸ H.R. Rep. No. 726, Part II, 98th Cong., 2d Sess. 14 (1984).

²⁹ Central Intelligence Information Act, Pub. L. No. 98-477, § 702(c)(2), 98 Stat. 2212 (1984), codified at 5 U.S.C. (Supp. IV) § 552a(q)(2).

ment of information that may be in error. . . . For some records systems, particularly those maintained by agencies with intelligence and criminal law enforcement functions, Congress allowed agencies to exempt records from the amendment process. This exemption was permitted because of the nature of law enforcement and intelligence records and because it is not easy or desirable to mandate a right of amendment for all of these records all of the time.

Continued access to those records under the FOIA is not inconsistent with the exemption from access under the Privacy Act.³⁰

Congress, in short, expressly recognized that access to law enforcement records under FOIA is not inconsistent with the Privacy Act's exemption for such records.

The Privacy Act does reflect Congress's concern about data banks, but that concern is irrelevant to the interpretation of FOIA. The requirements of the Privacy Act apply to *any* information about an individual contained in a "system of records," i.e., a group of records "from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a) (5) & (b) (emphasis added). Those requirements are not limited to private facts; they cover even the most public facts about an individual—facts which are clearly subject to disclosure under FOIA—if they are contained in a "system of records." To say that the Privacy Act reflects a concern about data banks thus proves nothing about whether particular information, whether located in data banks or elsewhere, can be withheld under FOIA.

The Privacy Act actually undermines the government's assertion that a privacy interest is created for purposes of

³⁰ H.R. Rep. No. 726, Part II, at 15-16 (emphasis added) (footnotes omitted).

FOIA when information is compiled in a data bank. When Congress addressed data banks in the Privacy Act and determined that certain protections were required, it specifically provided that the restrictions on disclosure imposed by the Privacy Act do not apply where "disclosure of the record would be * * * (2) required under section 552 of this title." 5 U.S.C. § 552a(b). This provision reflects a considered judgment that, whatever concerns data banks may raise, they do not justify *any* restriction on the broad right of access guaranteed by FOIA.

Much of the concern about data banks has been directed to compilations of data that disclose so much about a person's activities as to reveal a great deal about his private life. See, e.g., A. Westin, *Privacy and Freedom* 165 (1967). Whatever the force of that concern, it is not implicated here. This case does not involve an attempt to obtain a detailed profile of an individual. Respondents sought disclosure of only a discrete and very limited part of Charles Medico's history—the official, public actions (if any) taken to arrest, indict, convict or sentence him for committing a crime.³¹

³¹ The decision below does not impose unreasonable administrative burdens on the FBI. Gov't Br. 36-39. Because criminal-record information is so widely available to the public from court files and police records, the FBI can and should presume that such information is a matter of public record and thus subject to disclosure under FOIA.

The Privacy Act certainly does not preclude such a reasonable presumption. Although its restrictions apply where disclosure is not required by FOIA, 5 U.S.C. § 552a(b)(2), an agency has no obligation under the Privacy Act to undertake a fact-finding investigation before it responds to a FOIA request. Given the strict time limits imposed by FOIA, 5 U.S.C. § 552(a)(6), that could not have been Congress's intention. The FBI can fulfill any obligation under the Privacy Act by simply determining whether it has any information in its possession indicating either (1) that it is not the practice of the source jurisdiction to permit public access to court files or arrest records, or (2) that a particular criminal-record

III. THE PUBLIC INTEREST IN DISCLOSURE OUTWEIGHS ANY MINIMAL PRIVACY INTEREST THAT MAY BE INVOLVED.

Even if there could be some attenuated privacy interest in criminal-history information that is a matter of public record, it would be outweighed by the public interest in disclosure in this case. The government argues at great length that the court of appeals should have focused on the particular facts of this case in assessing the public interest in disclosure. Br. 40-47. But nowhere does the government demonstrate that such an appraisal would support its conclusion that the public interest in disclosure is outweighed by the alleged privacy interest involved. In fact, as respondents have consistently argued, a consideration of the specific purpose of their FOIA requests, and the particular circumstances surrounding those requests, confirms that there was a strong public interest in disclosure, which easily outweighed any minimal privacy interest at stake.

entry has been expunged or otherwise removed from the public domain. (The court of appeals' holding applies only to information that is in fact publicly available *and* is the type of information that the jurisdiction generally makes available. Pet. App. 20a, 41a-42a.) If it has no such information, it has no obligation to conduct an inquiry in the source jurisdiction.

If a particular jurisdiction wishes to ensure that either a general policy or a specific action (*e.g.*, an expungement) designed to remove criminal-record information from the public record serves to prevent access to the information from the FBI, it can accomplish its purpose quite easily by notifying the FBI whenever information is removed from the public record. Indeed, if the jurisdiction considered removal of the information from the public record an important step, it would presumably want to notify the FBI of the removal without regard to FOIA, so that the FBI would be aware of the jurisdiction's determination that the information should not be disclosed. Otherwise the FBI itself might rely on the removed information or disclose it even in the absence of a FOIA request.

It is entirely appropriate, respondents agree, for the Court to consider the purpose of their FOIA requests in assessing the strength of the public interest in disclosure.³² A request supported by the central purposes of the Act should not be treated in the same manner as a request supported only by a commercial or other purpose largely unrelated to the goals of the Act. In this case, there is no question that the purpose of respondents' requests falls squarely within "[t]he basic purpose of FOIA"—"to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted). The court of appeals recognized as much, for although it purported to eschew any consideration of respondents' "precise journalistic purpose," Pet. App. 25a, it stressed that "the government is utterly incapable of explaining to us why the information sought here does not fall within the Act's 'core' policy," *id.* at 38a.

In considering the public interest in disclosure, a court should consider not only the purpose of the request, but also the nature of the information requested and the position of the individual whom the information concerns. Here the information was criminal-record information, which is inherently public. The information concerned the principals of a defense contractor found to be dominated by organized crime, and was relevant to an assessment of the fitness of that defense contractor and the conduct of a prominent government official.

What a court should not do, respondents submit, is what the district court did—determine that although

³² That is not to say that respondents have a special status as reporters. Other members of the public could have articulated precisely the same objective as they did, and would have been entitled to the same treatment.

criminal records could have a significant bearing on these matters, the particular information in the government's possession is insignificant. For "the purpose of FOIA is to permit the public to decide *for itself* whether government action is proper." *Washington Post Co. v. United States Department of Health & Human Services*, 690 F.2d at 264 (emphasis in original). The court of appeals' reasoning on this point is unassailable:

The subjects of appellants' requests are alleged to have had dealings with government officials; it is surely up to the citizenry, once informed, to determine the relevance of the age of the arrests or convictions.

Pet. App. 38a.

The public had a strong interest in determining for itself whether a government contractor was dominated by criminals, whether a powerful Congressman had corruptly influenced the awarding of government contracts, and whether responsible government officials were taking appropriate corrective and punitive action. All of these interests supported respondents' FOIA requests and clearly outweighed any minimal privacy interest involved.

When Schakne began his investigation, the United States Attorney in Philadelphia was already investigating Congressman Flood for conflict of interest and corruption. *Ibid.* (Flood later pled guilty to charges of conspiring to solicit illegal campaign contributions from several persons seeking contracts with the federal government. 36 *Congressional Quarterly Almanac* 518, 525 (1980).) In the course of his investigation, Schakne learned that Congressman Flood had been instrumental in arranging Defense Department contracts for Medico Industries. J.A. 97. He also learned that the Pennsylvania Crime Commission had identified Medico Industries as a company "dominated by organized crime figures," and had reported that William Medico, the firm's

General Manager, had a criminal record that included "arrests for suspicion of murder and assault, and convictions for bootlegging and disorderly conduct." ³³ *Ibid.* Moreover, both the Pennsylvania Crime Commission and the Federal Bureau of Narcotics had identified William Medico as a "criminal associate" of organized-crime leader Russell Bufalino. *Ibid.*

Schakne could have reported the findings of the Pennsylvania Crime Commission and the Federal Bureau of Narcotics without undertaking any investigation of his own. But he chose instead to seek more specific information, so that the public could judge the facts for itself. He undertook to investigate whether and to what extent Medico Industries was in fact controlled by organized-crime figures. Given the relationship of the Medicos to Congressman Flood, the allegations of corruption that had been made against Congressman Flood, and the findings of the Pennsylvania Crime Commission and the Federal Bureau of Narcotics, the criminal records of the Medicos were clearly a legitimate subject of inquiry.

In *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir.), cert. denied, 454 U.S. 836 (1981), the Third Circuit specifically recognized that the Medicos were newsworthy because of their relationship to Congressman Flood. Phillip Medico had sued for libel based on a March 6, 1978 *Time* article discussing that very relationship. The article quoted a former Flood aide who had described Flood as "an official who used his considerable influence to direct federal contracts to people and companies that said 'thank you' in cash." ³⁴ The article reported that Medico Indus-

³³ The members of the Pennsylvania Crime Commission obviously did not believe they were invading Mr. Medico's privacy in reporting that information.

³⁴ *Medico v. Time, Inc.*, 509 F. Supp. 268, 269 (E.D. Pa. 1980), aff'd, 643 F.2d 134 (3d Cir.), cert. denied, 454 U.S. 836 (1981).

tries was suspected of being a link between Flood and Bufalino, and that Flood had steered government business to Medico Industries and travelled often on the company jet. 643 F.2d at 135. In holding that the *Time* article was privileged under the common law, the Third Circuit underscored the strong public interest in the topic of the article:

Elected officials derive their authority from, and are answerable to, the public. If the citizenry is effectively and responsibly to discharge its obligation to monitor the conduct of its government, there can be no penalty for exposing to general view the possible wrongdoing of government officials. Because the alleged defamation of Medico occurred in an article analyzing the conduct of former Congressman Flood, we believe it implicates this aspect of the supervisory rationale [of the fair-report privilege]. Moreover, even though *Time's* publication arguably may have tarnished the reputation of Medico, a private individual, as well as that of Representative Flood, the public has a lively interest in considering the relationships formed by elected officials.

Id. at 141-42 (footnote omitted).

The Third Circuit was unquestionably correct. It would be difficult to imagine a matter of more substantial and legitimate public concern than the relationship between a potentially corrupt Congressman—who was one of the most powerful figures in the House of Representatives—and a defense contractor that a state commission had found to be dominated by organized-crime figures. Confirmation that Medico Industries was dominated by organized crime would have raised grave questions, to say the least, about the conduct of Congressman Flood in arranging for the company to obtain government contracts; the actions of the Defense Department in awarding contracts to the firm; and the fitness of the firm to continue to perform such contracts.

Under these circumstances, the public interest in disclosure of the Medicos' criminal records was compelling. “[E]nsur[ing] an informed citizenry . . . needed to check against corruption” is a “basic purpose” of FOIA. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242. The public interest in disclosure of information relevant to whether corrupt practices are occurring outweighs privacy interests far more substantial than those asserted here. In *Columbia Packing Co. v. United States Department of Agriculture*, 563 F.2d 495 (1st Cir. 1977), which the government itself cites, Br. 45 n.33, disclosure of the personnel files of former meat inspectors was ordered despite “weighty” privacy interests, because of the strong public interest “in whether public servants carry out their duties in an efficient and law-abiding manner.” 563 F.2d at 498. *A fortiori*, disclosure must be ordered where, as here, any privacy interest is minimal. See also, e.g., *Cochran v. United States*, 770 F.2d 949, 956 (11th Cir. 1985) (“the balance struck under FOIA exemption six overwhelmingly favors the disclosure of information relating to a violation of the public trust by a government official”).

The public interest in exposing official corruption was not the only public interest supporting respondents' FOIA requests. Whether a defense contractor is controlled by criminal elements is a matter of great public concern, even if no official corruption was involved in awarding contracts to the company. The public was entitled to know whether Medico Industries was dominated by organized crime and, if so, what corrective and punitive measures were being taken by responsible officials.³⁵

³⁵ There is also a strong public interest in information concerning organized crime even when government contracts are not involved. See, e.g., *Medico v. Time, Inc.*, 643 F.2d at 142 (“*Time's* publication of FBI materials mentioning [Phillip] Medico served a legitimate public interest in learning about organized crime”); *Miller v. News Syndicate Co.*, 445 F.2d 356, 358 (2d Cir. 1971); *Time, Inc. v.*

The government argues that disclosure would not serve the "core purposes" of FOIA because

Mr. Medico is not himself a public official, and, although he is alleged to have had dealings with a former public official, no "financial crime" records that arguably might bear on that official's discharge of his public duties exist.

Br. 49 (footnote omitted). That Charles Medico himself is not a public official hardly eliminates the public interest in this case; nor does the fact that Congressman Flood resigned from the House of Representatives in 1980 after pleading guilty to criminal charges. See 36 *Congressional Quarterly Almanac* at 525. When the FOIA requests were submitted in 1978, Flood was Chairman of the House Appropriations Subcommittee and a senior member of the House of Representatives, J.A. 96, and the information requested was of current interest to the public. The public interest in disclosure must be judged as of the time the requests were submitted; otherwise, the government would unfairly benefit from the fact that its wrongful refusal to disclose the records led to this protracted litigation.³⁶

Nor is the public interest satisfied by the government's assurance that there is no "financial crime" information

Ragano, 427 F.2d 219 (5th Cir. 1970); *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir.), cert. denied, 398 U.S. 940 (1970). Confirmation that organized crime controlled an ostensibly legitimate business would have been important even if the company had not received federal contracts worth millions of dollars with the help of Congressman Flood.

³⁶ If the public interest in disclosure were assessed solely at the time of the final judicial balancing of interests, agencies would have an incentive to withhold documents relevant to a matter of public concern in the expectation that, by the time the case was finally decided in court, the matter would be stale and the public interest in disclosure therefore diminished.

concerning Mr. Medico. Respondents never limited their requests to "financial crime" information; they merely cited "financial crime" information as an *example* of the type of information that would be of great public interest.³⁷ It would be ludicrous to suggest that such information is the only criminal-record information that would be a matter of public interest, and even the government appears to concede that other crimes would be relevant. Br. 49 n.36.

Any evidence that the Medicos had criminal records was of potential significance to Schakne's investigation. Any criminal conduct is a serious matter, particularly when the individual is a principal of a defense contractor that was found to be "dominated by organized crime figures." J.A. 97. Given Charles Medico's position, the court of appeals was correct in refusing to distinguish among different types of crimes, or among convictions, indictments and arrests. Since he was "alleged to have had dealings with government officials," Pet. App. 38a, and there was a substantial possibility that those dealings were corrupt, any information showing that he had a criminal record was pertinent. Even if Charles Medico had *no* criminal record, confirmation of that fact would have served the public interest. In short, the public interest would have been served by disclosure of the facts, whatever they are.

The government's crabbed view of the public interest is revealed by a hypothetical it has advanced. It has asserted that there would be no public interest in disclosure of information showing that Charles Medico, like William Medico, J.A. 52, was arrested in February 1931 for

³⁷ J.A. 97 ("For example, a record of bribery, embezzlement or other financial crime by any of the principals of Medico Industries would potentially be a matter of great public interest since the company was receiving millions of dollars of federal funds.") (emphasis added).

violating the National Prohibition Act.³⁸ The government completely overlooks the fact that organized crime was extensively involved in bootlegging during Prohibition.³⁹ Such an arrest clearly would have been relevant to Schakne's investigation of whether the Medicos were involved in organized crime, particularly since Phillip Medico was convicted of transporting liquor in September 1930, *id.* at 118-19. Proof that Charles, William and Phillip Medico were all either arrested or convicted for bootlegging would have provided highly suggestive evidence that the family was indeed involved in organized crime, as the Pennsylvania Crime Commission had found.

In sum, respondents' requests were supported by a strong public interest in disclosure. Even if it could be said that there was some minimal personal privacy at stake, that interest would be far outweighed by the compelling public interest in learning whether a company to which an allegedly corrupt Congressman had steered lucrative defense contracts was in fact dominated by organized crime.

CONCLUSION

It stretches the concept of personal privacy beyond recognition to say that an individual's criminal record is a private affair. And it unduly limits the concept of the public interest to suggest that the public had no legitimate interest in the criminal records at issue in this case—those of the principals of a firm that had received lucrative defense contracts through the assistance of an allegedly corrupt Congressman, and that had already been found to be dominated by organized crime. Disclosure of those records would not constitute an unwarranted invasion of personal privacy. The judgment of the court of appeals should therefore be affirmed.

Respectfully submitted,

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³⁸ Reply Memorandum for the Petitioners, April 1988, at 3 n.4.

³⁹ See, e.g., Nelli, *American Syndicate Crime: A Legacy of Prohibition*, in Law, Alcohol and Order 123-37 (D. Kyvig ed. 1985).

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In the Supreme Court of the United States
OCTOBER TERM, 1988

**UNITED STATES DEPARTMENT OF
JUSTICE, ET AL., PETITIONERS**

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

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UNITED STATES DEPARTMENT OF
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REPLY BRIEF FOR THE PETITIONERS

The Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552, provides a broad mandate to "open agency action to the light of public scrutiny" (*Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). Yet its drafters recognized that allowing ready access to the federal government's vast accumulations of individualized data would invade personal interests that fall within the broad concept of "privacy." Congress addressed that problem by providing an exemption that it described as protecting interests "equally important" as the basic policies of FOIA.¹ And, unlike its approach to other FOIA ex-

¹ See S. Rep. 813, 89th Cong., 1st Sess. 3 (1965), reprinted in Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 38 (Comm. Print 1974) [hereinafter *FOIA Source Book*]. The uniquely important personal interests served by Exemption 6, 5 U.S.C. 552(b)(6), and the even broader Exemption 7(C), 5 U.S.C. (Supp. IV) 552(b)(7)(C), render inapt respondents' insistence that the exemptions at issue

emptions, Congress directed that privacy interests be protected not by outright exemption of defined categories of information, but by case-by-case balancing of the privacy and public interests involved.

Respondents attempt to truncate the balancing process by narrowly defining the range of "privacy" interests to be considered and by invoking a virtual *per se* rule that one has no "legitimate" interest in the practical obscurity of widely scattered and frequently unindexed "public records." And, although respondents appear to agree with much of our criticism of the court of appeals' approach to the "public interest" side of the balance, they again seek to avoid a real weighing of interests by insisting that *any* information regarding the backgrounds of government contractors readily outweighs the privacy interests at stake. In both respects, respondents' analysis fails to give full effect to the privacy protections Congress intended.

1. a. Although the term "privacy" is applied to a variety of legal interests, including common law rights and constitutional rights, the question before the Court in this case is a matter of statutory construction: What range of interests did Congress intend the courts to consider in determining whether a given disclosure would be an "unwarranted [or clearly unwarranted] invasion of personal privacy" (5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C))? Respondents attempt to restrict the range of such privacy interests. For example, they dismiss the "mere" possibility that the release of particular information may be embarrassing or even harmful to individuals, characterizing the "subjective" desire for privacy as unworthy of consideration (Resp. Br. 9-12, 27-28). Respondents insist that privacy interests in nondisclosure can be considered only when they relate to a "legitimate, objectively reasonable expectation" of secrecy (*id.*

here be "narrowly construed" (Resp. Br. 27 (quoting *United States Dep't of Justice v. Julian*, No. 86-1357 (May 16, 1988), slip op. 6)). Moreover, as this Court has also noted, all of the FOIA exemptions are integral parts of the Act itself and serve distinct congressional policies. See *EPA v. Mink*, 410 U.S. 73, 80 (1973); *Baldridge v. Shapiro*, 455 U.S. 345, 352 (1982).

at 9). In accordance with that formulation, respondents invoke the law of torts or constitutional theories of privacy to show that individuals have no "right" of privacy with respect to their criminal history records (Resp. Br. 13-14, 18, 21-23, 29, 32; see also American Newspaper Publishers Association et al. (ANPA) Br. 13).

Respondents' denial of a privacy "right" in this context is true in a sense but irrelevant to a proper FOIA analysis. We have never argued that the subjects of FBI criminal history records have a "right" to prevent the dissemination of such information.² Indeed, the FBI disseminates that information for a number of statutorily authorized purposes. Nor could an individual with a criminal record invoke a tort-based "right" to prevent the press from publishing any records that it obtained. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The lack of enforceable "rights," however, in no way negates the existence of strong privacy interests regarding such information, and respondents err in supposing that only privacy interests that give rise to such rights should be considered under FOIA.

The fallaciousness of respondents' position is demonstrated by examples of matters that the courts have held to raise important "privacy" concerns under FOIA. The court in *Baez v. United States Dep't of Justice*, 647 F.2d 1328 (D.C. Cir. 1980), upholding an Exemption 7(C) claim, noted that "[t]here can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject of an FBI investigation" (*id.* at 1338 (quoting defense affidavit); see also *Fund for Constitutional Gov't v. National Archives & Records Serv.*, 656 F.2d 856, 864-865 (D.C. Cir. 1981)). That correct result is inconsistent with respondents' focus on privacy "rights," for the subjects of FBI investigations have no "underlying right" to prevent government disclosure of

² The court of appeals implied the existence of a constitutionally based right of privacy in this area in *Menard v. Mitchell*, 430 F.2d 486, 490-492 (D.C. Cir. 1970), but that implication is effectively discredited by *Paul v. Davis*, 424 U.S. 693 (1976).

such facts (which may be necessary to aid in apprehension or for other important law enforcement purposes), nor do they have any "legitimate expectation" of secrecy in such matters. See *Paul v. Davis, supra*; see also Pet. Br. 22 n.6.

Thus, respondents' extensive discussions of cases involving the tort law of privacy concerning public records (e.g., Resp. Br. 21-23, 29, 33) are largely beside the point. Whether one focuses on the First Amendment, as in *Cox Broadcasting*, or on tort principles as such, those cases involve altogether different considerations, particularly the freedom of persons to speak of public record facts that they have learned. That such cases have found the subjects' interest in privacy outweighed by the great value our jurisprudence places on matters of "pure expression" (*Cox*, 420 U.S. at 495) does not mean that the privacy interests have no weight of their own.³ On the contrary, the willingness of at least some courts and commentators to let such privacy interests override even the right of free expression (see Pet. Br. 21-22 & n.5) indicates the importance of those interests.

Nor does the balance that is struck in tort law or First Amendment cases dictate the outcome of the very different balance when persons seek to obtain information, rather than publish information they have already obtained. There is no general constitutional right of access to information held by the government. See generally *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). The interest of persons in access to government information is, moreover, different from—and weaker than—that in publishing whatever information they obtain. See *Press-Enter-*

³ Similarly, the academic writings that ANPA cites (ANPA Br. 12-15) questioning the advisability of recognizing a general "right" to control information about oneself are beside the point, since they focus on tort law, and not on access to information. Moreover, the author of the article on which ANPA principally relies acknowledged that his stance on these issues is well out of the mainstream, and bemoaned the "legislative trend" toward greater protection of personal privacy. See Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393, 404, 406 (1978).

prise Co. v. Superior Court, 478 U.S. 1, 20 (1986) (Stevens, J., dissenting). The Court recognized that difference in *Cox Broadcasting*, indicating that, although the States cannot penalize the publication of public record information once obtained, the decision whether to release such information is a distinct policy question to be addressed by "political institutions" (420 U.S. at 496). Here, Congress has determined that release should not take place if it "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7) (C)).

The legislative history of Exemption 6 evinces a broad purpose to exclude from mandatory disclosure "those kinds of files the disclosure of which *might harm* the individual." H.R. Rep. 1497, 89th Cong., 2d Sess. 11 (1966), *FOIA Source Book* 32 (emphasis added). Thus, contrary to respondents' contentions, the potential of information to harm or embarrass the individual subject is at the heart of the "privacy" concerns expressed by Congress.⁴ Although the interest of the individual in controlling the dissemination of information about himself may be outweighed in particular instances by a public interest in disclosure, there is no support for respondents' position that a court should not even consider that individual

⁴ Although respondents invoke the principle—borrowed from Fourth Amendment jurisprudence—of one's "legitimate expectation of privacy," they make only a brief and unsuccessful effort to relate that principle to FOIA itself (Resp. Br. 11-12). The cases respondents cite do not support the proposition that the balancing of interests under Exemptions 6 and 7(C) is limited to areas of such "legitimate expectations"; on the contrary, these cases themselves focus on whether the information at issue is of an "embarrassing" nature. See *Washington Post Co. v. United States Dep't of HHS*, 690 F.2d 252, 262 (D.C. Cir. 1982); *International Bhd. of Elec. Workers v. United States Dep't of Housing & Urban Dev.*, 593 F. Supp. 542, 544 (D.D.C. 1984), aff'd, 763 F.2d 435 (D.C. Cir. 1985). Moreover, the commentary that respondents cite acknowledges that protection of individuals from harm and embarrassment was the chief goal of Congress in enacting Exemption 6. See Kronman, *The Privacy Exemption to the Freedom of Information Act*, 9 J. Legal Studies 727, 739 (1980).

interest unless it rises to the level of a constitutional or tort-based "right."⁵

b. A second flaw that pervades respondents' arguments is their focus on underlying records of arrests, indictments, and convictions, rather than on the compilations at issue here, which raise distinct privacy concerns that respondents ignore. For example, respondents discuss at length the "public" nature of the various steps of the criminal justice process, arguing the importance of exposing those events to public view and decrying the possibility of "secret" criminal proceedings (Resp. Br. 13-20). Such arguments are misdirected, for we have never argued that an arrest—much less an indictment or conviction—is a "private occurrence."⁶ It is an altogether different question, however, whether unlimited public access to a federal government file that collects millions of arrest and conviction records from thousands of scattered and often obscure sources implicates "personal privacy."

Respondents deny that the large-scale compilation of criminal history records can make any difference for FOIA purposes (Resp. Br. 26). The simple notion that "[t]he focus of FOIA is on information" (*ibid.*), however, does not answer this complex

⁵ In arguing that a focus on the embarrassing nature of information "proves too much" (Resp. Br. 28), respondents merely illustrate how readily the proper balancing test can be applied. Their examples of "embarrassing" facts that should not qualify for withholding under Exemption 6—those of a government official who has abused public funds, and of a citizen who has sold government secrets—implicate the exact sort of public interests in responsible government that FOIA was meant to further. The invasion of privacy is real and deserves to be considered, but it is plainly "warranted."

⁶ See Resp. Br. 17 (quoting W. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, Pt. I, at 13 (Sept. 26-27, 1974)). The lecture that respondents quote points out, immediately after the passage quoted by respondents, that "to conclude that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of information." See also Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 Kan. L. Rev. 1, 9 (1974).

question. Although this Court held in *FBI v. Abramson*, 456 U.S. 615 (1982), that records remain "law enforcement" records for Exemption 7 purposes even when they are incorporated into other kinds of records, it distinguished the case of internal agency records, which can lose their exempt status under Exemption 5, 5 U.S.C. 552(b)(5), by inclusion in final agency decisions (456 U.S. at 630). In each instance, the result is dictated by the purposes behind the particular exemption invoked (*ibid.*). Thus, the question here is whether the purposes of Exemptions 6 and 7(C) call for the courts to take account of or to ignore the distinct nature of large-scale compilations of data on individuals.

Congress was specifically aware of the "privacy" concerns that were frequently voiced about government data banks, including criminal history data banks. See Pet. Br. 24-30. Before the 1974 FOIA amendments, Congress and others focused a great deal of attention on those issues—consistently under the rubric of "privacy" (*ibid.*). Respondents miss the point of these developments (Resp. Br. 34-39). Of course, the consideration of various legislative proposals regarding criminal history records does not in itself show that Congress intended to bar disclosure under FOIA; but it does reflect an understanding of the range of interests comprised within the term "privacy," as Congress used it in Exemption 7(C).

Respondents mischaracterize our discussion of the Privacy Act of 1974, 5 U.S.C. 552a, and its legislative history as an attempt to equate Privacy Act exemptions with FOIA exemptions (Resp. Br. 36-39). The Privacy Act is relevant specifically because its history reflects a clear congressional understanding that the term "privacy" includes the interest in limiting the dissemination of information collected in large government data banks, even when that information has its origin in "public" sources (see Pet. Br. 29-30; Pet. App. 44a (Starr, J., dissenting)). Respondents acknowledge that the Privacy Act's provisions are "not limited to private facts" (Resp. Br. 38), but they fail to grasp the significance of that proposition. Just as the Privacy Act is premised on a broader concept of "privacy" than

respondents would prefer, Exemption 7(C) of FOIA – passed contemporaneously with the Privacy Act – is based on a similarly broad concept of privacy and should be interpreted accordingly.

In failing to focus on the distinct problems of large-scale compilation of records, respondents also ignore or greatly underestimate the serious practical difficulties faced by both the government and the subjects of such files. Respondents' only answers to the well-documented and serious difficulties that the wide dissemination of criminal history creates for the individual subjects (Pet. Br. 33-34) are either to suggest speciously that considerations of "fairness" are not at issue (Resp. Br. 19)⁷ or to tout the "condemnation" of criminal violators – including, apparently, the use of bare arrest records by private employers and credit bureaus – as a positive virtue of their position (*id.* at 27, 30; see also ANPA Br. 14-15). Some degree of such harms may be inherent in the criminal justice process, but the question here is whether FOIA was intended to *increase* those harms by affording instant, nationwide availability to records that would otherwise be obscure. In light of Congress's express intent to bar disclosure of information that "might harm the individual" (H.R. Rep. 1497, *supra*, at 11, *FOIA Source Book* 32), it is difficult indeed to see such disclosures as consistent with FOIA, unless they serve the sort of public interests FOIA sought to advance.

Moreover, the practical difficulties inherent in the maintenance of large data banks, such as the FBI's rap sheet files, are not answered by respondents' glib assertion that the FBI should simply make sure that there are no inaccuracies in its criminal history records (Resp. Br. 34 n.26). The reality is that mistakes

⁷ Although respondents suggest that "education" will resolve any problems of unwarranted actions based on arrest records (Resp. Br. 19-20), the extravagantly speculative inferences respondents themselves draw from William Medico's arrest records (*id.* at 47-48) belie their attempt to characterize the problem of unfairness in the use of such records as unimportant. The misuse or misunderstanding of limited information is also reflected in ANPA's unsupported characterization of Charles Medico as a "reputed organized crime figure" (ANPA Br. 3).

will occur, and that the release of inaccurate information will be extremely harmful to the individuals affected.⁸ Respondents also do not face up to the administrative dilemma that their narrow view of "privacy" would create. Under the court of appeals' holding, the existence of any privacy interest in particular information would turn on whether, as a matter of fact, that information is "publicly available" (Pet. App. 41a-42a). However, for a variety of reasons – varying local practices, unreported expungements, or even lost records – that fact is often not known to the FBI when it receives an individual request. Protection of even those privacy interests that the court of appeals would acknowledge thus requires the agency to undertake new factual inquiries. Respondents' answer to this problem – that the FBI should "presume" public availability (Resp. Br. 39-40 n.31) – would simply have the FBI ignore the privacy interests that Congress intended it to safeguard.⁹ The real answer to this

⁸ Both respondents and ANPA argue that the problem of inaccuracies will be alleviated by public release of such records (Resp. Br. 34 n.26; ANPA Br. 16). But public dissemination of such information is the very harm to be avoided. Respondents' argument, if credited, could be used to justify *any* invasion of privacy, on the ground that it would allow the public to monitor the government's collection of inaccurate or embarrassing information. The interest of individuals in assuring accuracy is far better served by the Justice Department's regulations, which allow an individual to obtain access to his own rap sheet. See 28 C.F.R. 20.34.

⁹ Indeed, respondents' footnote 31 now appears to abandon the limitation of their request to "matters of public record" (J.A. 33). Respondents now show that they do not really want petitioners to undertake outside research into the public availability of the records – outside research that FOIA does not mandate (see Pet. Br. 36-39) – but instead want petitioners to avoid such research by presuming public availability (and thereby negating the "public record" limitation that respondents placed on their request). Thus, although we believe that withholding of the requested records in this case (if any exist) is proper even if we assume that every record at issue is a "matter of public record" somewhere, this Court should not be misled by assertions of respondents and their amici (e.g., ANPA Br. 9-10) that only "public" records will be affected by the decision in this case.

dilemma is to recognize that it is the consequence of respondents' erroneously cramped view of "privacy." If, consistent with FOIA's legislative history, that term is read to encompass the distinct problems associated with compilations of obscure, scattered records, the FBI will be able to make a practical assessment of the privacy interests at stake without need for contrived presumptions of public availability.

c. Respondents' position also is inconsistent with *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982), in which this Court rejected the argument—made in a somewhat different form—that matters of "public record" are beyond the scope of the FOIA privacy exemptions. As noted above, respondents criticize our invocation of broad definitions of "privacy" as entailing the interest of individuals in controlling the dissemination of information about themselves. See Resp. Br. 27; Pet. Br. 20-21. Although respondents themselves nowhere state a clear definition of "privacy," the terminology they invoke is that of "intimate details," recalling the threshold test they advanced, and this Court rejected, in *Washington Post*. Resp. Br. 10; see also ANPA Br. 11-12, 14.¹⁰

Washington Post focused not on the balancing test but on the "similar files" threshold of Exemption 6, which respondents and their supporting amici read as excluding any information reflected in "public records." The arguments made in support of that proposition, however, were very similar to those made now. In particular, respondents in that case argued that the "public records" at issue there were necessarily without "privacy" implications, urging that such records "would not be eligible for withholding under Exemption 6 no matter how that term [i.e., similar files"] is interpreted" (Brief for the Respon-

¹⁰ The similarities between the present case and *Washington Post* include not only the issues but the parties as well. The *Washington Post*, an amicus in the present case, was the respondent in that case, represented by the same law firm representing the present respondents. Respondent Reporters Committee appeared as amicus in the earlier case, joined by ANPA.

ent at 24-34, *United States Dep't, of State v. Washington Post Co.*, *supra*).

This Court rejected those arguments and remanded the case for consideration of "the effect of disclosure upon the privacy interests of [the subjects]" (456 U.S. at 603). Respondents now see in that disposition no impediment to their argument that there can be *no* privacy interest in "public record" information, but their view would render this Court's remand in that case a pointless formality: since the only information sought in that case was a matter of public record "somewhere in the Nation," there would have been nothing for the lower courts to balance if respondents' view of "privacy" interests were correct.

In seeking to avoid outright conflict with *Washington Post*, respondents struggle—as did the court of appeals—to articulate some limitation on their stance that there is no "legitimate" privacy interest in matters of "public record," no matter how obscure as a practical matter. Respondents suggest that "[t]here may be matters that are reflected in some public records that could properly be withheld [under FOIA]" (Resp. Br. 25-26 n.16), but they fail to specify any types of records that might qualify for such treatment or to explain how such a result could be squared with their "legitimate expectations" premise. Respondents also invoke the court of appeals' means of avoiding outright conflict with *Washington Post*, by suggesting that a showing of "particular harm" might give rise to a privacy interest (Resp. Br. 28). Apart from the inadequacy of that approach for reasons we have discussed (Pet. Br. 33 n.20), it is inconsistent with respondents' insistence elsewhere that harm to

¹¹ Respondents' current arguments parallel those advanced in *Washington Post* in other respects. Here, as there, respondents stress the view that harm or embarrassment to the subjects of government information should be ignored, and that the courts should instead focus on "legitimate expectations" of privacy. See Brief for Respondents at 20-23, *United States Dep't of State v. Washington Post Co.*, *supra*. The present arguments regarding the "public" nature of criminal proceedings, moreover, are closely analogous to those made with respect to citizenship proceedings in *Washington Post* (*id.* at 24-27, 31-33). See also Brief Amici Curiae of the American Newspaper Publishers Association, et al., at 3, *United States Dep't of State v. Washington Post Co.*, *supra* ("such uniquely public information [records of citizenship] can never be withheld from the public in the name of 'privacy' ")).

the individual is insufficient to create a "privacy" interest (Resp. Br. 11).

In sum, both respondents' insistence on "legitimate expectations" of privacy "rights" and the court of appeals' dismissal of the privacy concerns posed by the dissemination of compilations of otherwise public records as "insignificant" (Pet. App. 20a) represent attempts to impose artificial limitations on the range of privacy interests to be considered. Both the legislative history of FOIA and this Court's approach in previous Exemption 6 cases, however, show that the proper approach is to take the full range of such interests into account, and to consider the "public record" status of information – along with all other relevant factors – in the judicious balancing of interests that Congress mandated.

2. Once the proper range of relevant privacy considerations is identified, the analysis under FOIA's privacy exemptions turns to a balancing of such considerations against the public interest in disclosure. See *Rose*, 425 U.S. at 373. As we have noted (Pet. 22; Pet. Br. 39), the court of appeals' most drastic departure from existing FOIA law in the present case was its holding that a court's assessment of the "public interest" for this purpose requires no evaluation of the particular information being sought, but simply a recognition of the overall disclosure policies of FOIA itself. In this Court, no one has attempted to defend the court of appeals' approach to this issue.

The parties and amici are not entirely in agreement, however, as to the type of analysis that should be used in place of that of the court of appeals. Our own approach to this issue is founded on the policies of FOIA itself: in assessing whether a particular invasion of privacy is "unwarranted," a court should consider whether disclosure is supported by the essential policies of FOIA itself, of "open[ing] agency action to the light of public scrutiny" (see *Rose*, 425 U.S. at 372). This obviously requires specific consideration of the particular information sought: although disclosure of the FBI rap sheet of "one's otherwise inconspicuously anonymous next-door neighbor" (Pet. App. 45a (Starr, J., dissenting)) surely does not advance FOIA's goals, disclosure of the rap sheet of a high-ranking government official

may do so, if it reflects crimes that call into question the official's ability to perform public duties competently and honestly.

Respondents themselves do not appear to take issue with our basic approach to the public interest side of the balance, geared to the "core purposes" of FOIA. In arguing for disclosure in the present case, respondents argue that disclosure will serve the "basic purpose" of FOIA (Resp. Br. 41, 45 (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978))). Although we disagree strenuously with respondents' assessment of the extent to which the records at issue in the present case touch on FOIA's core purposes, we and they are in apparent agreement as to the essential test of the "public interest."¹²

¹² In one respect, however, respondents go further than we do in disagreeing with the analysis of the public interest issue by the court of appeals. Respondents attempt to insert into the analysis consideration of the "purpose" of the specific FOIA request (Resp. Br. 41; cf. Pet. App. 23a-24a). For reasons we have summarized (Pet. Br. 47 n.35), we do not think that factor has an appropriate place in Exemption 6 or Exemption 7(C) balancing. Instead, in our view, Judge Leventhal got it right long ago when he (and the court) repudiated the D.C. Circuit's initial false step on this issue (*Getman v. NLRB*, 450 F.2d 670, 675, 677 n.24 (1971)) and explained that "[a] general balancing of the privacy loss from release *to the public* and the public interest in disclosure *to the public* would carry out the discernible intent of the Senate Report without conflicting with the Act's broad purpose to enable 'any person' to request disclosure without making a showing that he was 'properly and directly concerned['] with the information." *Ditlow v. Shultz*, 517 F.2d 166, 172 n.21 (D.C. Cir. 1975) (citations omitted; emphasis added).

Because respondents claim no special interest in the requested information other than their interest in disseminating it to the general public, it is doubtful that anything in this case turns on the difference between the *Getman* approach that respondents advocate and the *Ditlow* approach that we advocate. Nevertheless, the farfetched claims of some amici call for brief response. The claim of amici Public Citizen et al. (Br. 21-22) that this issue was resolved in *Department of Justice v. Julian*, *supra*, is wrong. *Julian* fashioned a narrow exception – in the context of applying Exemption 5 to a request by the subject of the records – to the general principle that a party's rights under FOIA "are neither increased nor decreased by reason of the fact that it claims an interest in the [requested records] greater than that shared by the average member of the public" (*NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); see also *EPA v. Mink*, 410 U.S. at 86). Public Citizen's position in this case

Some amici, however, do attack our focus on FOIA's core purposes in assessing the public interest in disclosure (e.g., NARFE Br. 11-13). Yet, in their attempts to deny the existence of ascertainable "core purposes" of FOIA, they only succeed in restating them. The need to obtain information "to evaluate federal programs and formulate wise policies" (*id.* at 11, quoting *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971)), for example, is among the core purposes we have articulated. And, although the legislative history of FOIA indeed invokes James Madison's words about the power of knowledge (see NARFE Br. 11-12), the purpose of that knowledge—*i.e.*, to ensure that the people can "be their own governors"—shows again that FOIA is directed chiefly to illuminating the workings of government to enable citizens to make informed political choices.

Contrary to NARFE's repeated assertions that a core purposes test is "unworkable," Congress itself has articulated just such a test in the provision of FOIA that waives or reduces fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" (5 U.S.C. (Supp. IV) 552(a)(4) (A)(iii)). That standard shows that, in Congress's view at least, there is indeed a principled and workable means of assessing the public interest in the release of particular information. In denying the usefulness of this approach, NARFE falls into the same trap as the court of appeals by failing to recognize that a court can meaningfully assess "the interest of

would require the Court to fashion a new and entirely different exception to that general principle. Likewise, the claim by the National Association of Retired Federal Employees (NARFE) that in all cases other than this one the courts have followed the *Getman* approach (Br. 6) is not at all accurate. Virtually the only reasoned discussion of the issue to be found anywhere in the case law is in *Getman v. NLRB*, *supra*; *Ditlow v. Shultz*, *supra*; *Washington Post Co. v. United States Dep't of HHS*, 690 F.2d 252, 258, 259 n.17 (D.C. Cir. 1982); and *United States Dep't of the Air Force v. FLRA*, 838 F.2d 229, 233 (7th Cir. 1988), petition for cert. pending, No. 88-354. Apart from *Getman*, which has been repudiated within its own circuit, all of those cases support our approach.

the general public in release of the records themselves" (Pet. App. 26a).

Amici Public Citizen et al. argue that various "weighty objectives" apart from the purposes of FOIA itself may be served by the disclosure of information subject to the privacy exemptions (Pub. Citizen Br. 18-19). It is unclear, however, why FOIA should be construed to further those objectives, which by hypothesis were not a purpose of FOIA's enactment, at the expense of the personal privacy concerns that Congress expressly acknowledged and addressed in the statute. The awkwardness, standardlessness, and unpredictability of allowing federal judges to invade personal privacy whenever they think *any* countervailing objective is sufficiently "weighty" is what properly led the court below to seek a less "idiosyncratic" approach (Pet. App. 21a-23a). The court went too far in insisting that *every* approach to this issue is necessarily standardless, but the court was hardly unjustified in eschewing the approach that amici now advocate, in which the "public interest" depends not on identifiable concerns of FOIA itself but on the ingenuity of counsel in identifying an objective that will strike the judge as worthy. A focus on the policies of FOIA itself solves this problem and provides a principled structure for the public interest analysis (see Pet. Br. 45-47).

3. As noted above, respondents themselves invoke the "basic purpose" of FOIA, and they attempt to characterize the materials they seek as information the disclosure of which is "needed to check against corruption and to hold the governors accountable to the governed" (Resp. Br. 41, 45 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 242)). These attempts fail, however, since respondents can establish no logical connection between such vaunted public interests and any information actually at issue in this case.

Respondents repeatedly emphasize that the ultimate target of their investigations was a matter that would raise a significant public interest—uncovering possible corruption by a Member of Congress. That fact alone, however, falls far short of

establishing that any and all information respondents seek serves that public interest sufficiently to warrant a significant invasion of privacy. The district court properly recognized that, in order for the release of information to be warranted under Exemption 6 or 7(C), there must be some logical connection between the information at issue and the public interest (Pet. App. 57a).

Respondents criticize the district court for drawing the conclusion that the value to the public of any information actually at issue in this case is insignificant. They argue that the public should "decide for itself" the significance of any information (Resp. Br. 42 (quoting *Washington Post Co. v. United States Dep't of HHS*, 690 F.2d at 264)). Respondents' argument, however, proves too much. The case they cite (unlike the present one) involved a situation where the information sought plainly had a logical connection to a distinct public interest,¹³ and the court merely pointed out that the goal of FOIA is to let the public decide "for itself" whether the government was taking proper steps in light of this information. When the question is whether there is any such logical connection at all, however, FOIA obviously does not require that the public decide the relevance of every item "for itself"; that would be to require disclosure to the public as a step in the very balancing process mandated by the statute to determine whether disclosure is warranted. Congress has instead entrusted the task of balancing the public and private interests at stake to the agencies, subject to de novo review by the courts.¹⁴

In their attempt to substitute a per se rule for the careful assessment of the public interest in disclosure mandated by the statute, respondents assert that there was a significant public interest in "*any* evidence" of a criminal record by any of the prin-

¹³ That case involved financial disclosures made by consultants employed by the National Cancer Institute, which had a strong and direct connection to the public interest in ascertaining any conflicts of interest by such persons. See 690 F.2d at 264.

¹⁴ In light of the availability of de novo review, the charge of amicus ANPA that our analysis would "imbue the FBI with virtually unlimited discretion" (ANPA Br. 18) is baseless.

ciples of Medico Industries (Resp. Br. 47). That unsupported assertion sweeps far too broadly and would eviscerate the protections of the FOIA privacy exemptions for large classes of persons. To use a hypothetical example, a 30-year-old arrest for disorderly conduct, which did not lead to ~~a prosecution, an arrest,~~ would not bear on the fitness of a firm controlled by the arrestee to perform government contracts. For the reasons discussed above, release of such information would significantly invade that arrestee's privacy interests, and it is plain that such an invasion of privacy would in no way be "warranted" by any discernible public interest. But respondents' approach to this issue would require release of such information, and presumably of any personal information involving any government contractor or any government employee. Such a ready finding of a public interest in disclosure would mock Congress's determination to temper FOIA's policies of disclosure with protection of "certain equally important rights of privacy" (S. Rep. 813, 89th Cong., 1st Sess. 3 (1965), *FOIA Source Book* 38).

Respondents also stress the "newsworthy" nature of the events surrounding Representative Flood and the Medicos (Resp. Br. 43-44). As with their privacy discussion, however, here respondents confuse the freedom to publish information with their interests in obtaining it. We would not dispute the proposition that the Medicos were "newsworthy" in some sense, and, as noted above, respondents doubtless enjoy a broad right to publish such information as they can obtain. Those considerations do not, however, show that there is any connection between the information they seek and the sort of public interests served by FOIA.

We cannot, of course, state here what information, if any, is to be found in the records respondents seek.¹⁵ But there is no reason to think that the judges who have actually examined any

¹⁵ Contrary to the assertions of amicus Public Citizen, there is nothing in the least "absurd" (Pub. Citizen Br. 23) about our continued insistence that any confirmation that Charles Medico does or does not have a criminal record would itself give away information that the FOIA privacy exemptions seek to protect. The court of appeals did not, as Public Citizen claims, "explicitly confirm[]" the existence of a criminal record (*ibid.*), and any passages in the

withheld records—and rejected respondents' position—have ignored the interests that respondents propound. A connection between the records and the public interest would be most obvious if the subject himself were a public official, but it is also conceivable that the requisite public interest would be present if there were any records tending to show that contracts were improperly awarded, that Medico Industries was unqualified to receive government contracts, that contract performance was inadequate, or that there was "corruption" of any sort surrounding any government contracts. If, however, a court reviewing the materials *in camera*—as the district court did—can satisfy itself that the information at hand has no logical connection to any such public interests, then it should not order the disclosure of information that touches on important privacy concerns. That is precisely what the district court did in the present case (Pet. App. 57a-58a), in a judgment confirmed by the only member of the court of appeals who purported to engage in a balancing of interests (Pet. App. 49a). This Court too is fully capable of examining any withheld records in light of respondents' arguments and reaching what we believe to be the inevitable conclusion: that there are no records in this case imbued with a sufficient public interest to overcome the privacy interest of Charles Medico.

court's opinion that might seem to imply that such a record exists (see Pet. App. 16a, 22a) are merely unfortunate—and not necessarily accurate—lapses from the court's duty to safeguard, *pendente lite*, the very information whose public availability is at issue. Furthermore, if anything is "absurd," it is the sort of public disclosure in the course of the FOIA litigation itself that Public Citizen apparently favors—a listing of any rap sheet entries, indicating type, age, and nature of the offense (Pub. Citizen Br. 24)—which would preemptively destroy the very privacy interest that is at issue. Indeed, the simple statement that an individual "has a criminal record" is itself highly damaging information, which may be all the more harmful because it is incomplete.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

Supreme Court of the United States

FILED

JUN 17 1988

States SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Respondent.

**ON WRIT OF CERTIORARI
 TO THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF OF AMICI CURIAE

SEARCH GROUP, INC.,
 THE STATE OF NEW YORK,
 DIVISION OF CRIMINAL JUSTICE SERVICES,
 THE COMMONWEALTH OF KENTUCKY,
 JUSTICE CABINET
 AND UNITED STATES CONGRESSMAN
 DON EDWARDS, (CHAIRMAN, SUBCOMMITTEE
 ON CIVIL CONSTITUTIONAL RIGHTS,
 HOUSE COMMITTEE ON THE JUDICIARY).
IN SUPPORT OF PETITIONERS

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<u>SEARCH, Technical Report No. 14, The American Criminal History Record: Present Status and Future Requirements (1976) -----</u>	21

I. STATEMENT OF THE CASE AND SUMMARY OF AMICUS ARGUMENT

This case poses a critical criminal justice information issue. Can a criminal history record^{1/} be withheld under the federal Freedom of Information Act, 5 U.S.C. § 552 (1982) ("FOIA"), on the grounds that public disclosure could reasonably be expected to constitute an unwarranted invasion of personal

^{1/} We use the term "criminal history record" throughout this memorandum to refer to cumulative, name indexed records consisting of descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and any disposition arising therefrom, as well as information relating to sentencing and correctional supervision and release. As such, this term conforms to the definition in the federal regulations that govern the operation of state and local criminal history record systems, 28 C.F.R. § 20.3(b) (1987), and the definitions found in most state criminal history record legislation. The term "rap sheet" is a synonym for criminal history record.

privacy, even though some of the component parts of the record are available to the public from the police departments and courts that originally created these component parts.

A. Statement of the Case

This case arose as a result of a FOIA request to the Federal Bureau of Investigation ("FBI") by Robert Schakne, a CBS News correspondent, and the Reporters Committee for Freedom of the Press, an association of journalists. Their request sought all records indicating arrests, indictments, acquittals, convictions, and sentences -- in other words, criminal history records -- compiled by local, state or federal law enforcement agencies or courts relating to the Medico brothers, Phillip, Charles, William and Samuel. The

Reporters Committee for Freedom of the Press and Schakne eventually limited their request to criminal history records consisting of information that was a "matter of public record."

The FBI partially denied the request on the grounds that the records sought were exempt from disclosure under the FOIA exemptions at 5 U.S.C. § 552(b)(3) (1982) [covering records that are made specifically exempt from disclosure by other statutes];^{2/} 5 U.S.C. § 552(b)(6) (1982) ["Exemption 6"] [covering various kinds of personal records, the disclosure of which would constitute a clearly unwarranted invasion of privacy], and

^{2/} The FBI's claim with respect to the applicability of the exemption at 5 U.S.C. § 552(b)(3) (1982) has not been pursued in the Supreme Court.

5 U.S.C. § 552(b)(7)(C) (1982) ("Exemption 7(C)] [covering law enforcement records that could reasonably be expected to constitute an unwarranted invasion of privacy].

The district court upheld the FBI's partial denial, in part on the grounds that release could reasonably be expected to constitute an unwarranted invasion of personal privacy. The United States Court of Appeals for the District of Columbia Circuit, in two separate opinions, reversed.

The court of appeals' first opinion noted that when a federal agency seeks to withhold law enforcement records under Exemption 7(C), the agency must balance the record subject's privacy interest against the public interest in disclosure. Reporters Committee for

Freedom of the Press v. United States Department of Justice, 816 F.2d 730, 737 (D.C. Cir. 1987). In calculating the privacy interest, the court concluded that if "a state legislature requires arrests and convictions to be recorded made freely available by the primary source to the general public, any privacy interest in those records seems insignificant." Id. at 740. The court of appeals remanded the case to the district court to determine if applicable law or policy made the component parts of the records available to the public at their source.

The Department of Justice and the FBI sought a rehearing of the court of appeals' Exemption 6 and 7(C) determinations. SEARCH Group, Inc. and agencies of the states of New York and California filed an amicus petition

in support of the petition for rehearing. Upon review, a majority of the court of appeals panel reaffirmed its initial holding but changed, at least in part, the rationale for the holding. Judge Starr, on the other hand, voted to grant a rehearing and dissented from the majority decision.

On the privacy side of its analysis, the majority held in its second opinion that state law with respect to the disclosure of criminal history records, and presumably original records of entry, was irrelevant. Instead, the majority directed the district court to make a "factual determination" of whether information about arrests and convictions reflected in the criminal history record had previously appeared on the public record -- presumably at their primary source. As the

majority now saw it, if the information in question was available from primary sources, then the privacy interest would "fade" and whatever privacy interest remained would be "slight." This slight privacy interest could outweigh the public's interest in disclosure only if it could be shown that some specific and presumably significant harm would arise from disclosure. Reporters Committee for Freedom of the Press v. United States Department of Justice, 831 F.2d 1124, 1126-7 (D.C. Cir. 1987). (Hereafter, the first and second opinions are sometimes collectively referred to as "Reporters.")

Judge Starr dissented on a number of grounds. In particular, his dissent recognized that the privacy risk posed by the public disclosure of a computerized

compilation of criminal history data is very different from the risk posed by disclosure of original source records. Accordingly, Judge Starr concluded that whether records are available at their source is irrelevant to a determination of whether disclosure of criminal history records would be likely to result in an unwarranted invasion of privacy.

As I see it, computerized data banks of the sort involved here present issues considerably more difficult than and certainly very different from a case involving the source records themselves. Id. at 1128.

B. Summary of Amicus Argument

The Amicus parties assert that the majority below failed to take the proper considerations into account in identifying the

privacy interests at stake when criminal history records are sought under the FOIA.

First, the court of appeals should have evaluated whether, as a practical matter, criminal history records are, in fact, on the public record merely because some of their component parts are publicly available at their source. The court of appeals would have found that as a practical matter, members of the public cannot assemble a criminal history record from primary source records because to do so is too expensive, too time consuming and simply too difficult. Accordingly, the fact that many of the component parts of a criminal history record theoretically are available, separately and individually, from primary sources does not eviscerate a record subject's privacy interest.

Second, the court of appeals should have evaluated whether as a policy matter, criminal history records are on the public record. The court of appeals would have found that, as a matter of state law, state and local rap sheets are not placed on the public record. Statute law and regulations in all but a handful of states, make criminal history records, and particularly the nonconviction record^{3/} component of criminal history records, unavailable to the public, even while making many of the component parts of the

record available to the public from source documents.

Finally, the majority below, in weighing the privacy interest against the public's interest in disclosure, should have taken into account the same considerations that have led legislatures in almost every state to conclude that criminal history records should be confidential -- namely, that the public release of criminal history records, (more so than the release of original record of entry data) generally results in serious harm to privacy interests. These harms include: (1) the risk that release of a comprehensive, detailed and often times dated record of an individual's criminal conduct may cause greater damage to an individual's reputation and privacy than the release of merely a piece

^{3/} We use the term "nonconviction records" to refer to a record of an arrest without a disposition if more than one year has elapsed from the arrest and no active prosecution is pending as well as information indicating that a prosecutor has dropped charges and all other dismissals and, as well, all acquittals. As such, this term conforms to the definition in the federal regulations at 28 C.F.R. § 20.3(k) (1987).

of the total record; (2) the risk that the criminal history records maintained by the FBI, being merely compilations from many secondary sources, may contain inaccurate and incomplete information; and (3) the risk that release of criminal history records to any person for any purpose on the basis of a "name only" inquiry may result in the release of information about the wrong individual.

II. STATEMENT OF INTEREST

A. Identification of Amicus Parties

The Amicus parties are identified in some detail in Appendix B. The Amicus parties consist of a not-for-profit organization comprised of Governors' appointees from all

fifty states, who in most states are responsible for the operation of their states' criminal history record repository; agencies of the states of New York and Kentucky that are responsible for operating their states' criminal history record repositories; and a member of Congress who chairs a subcommittee with oversight responsibility for the FBI's handling of criminal history records.

B. The Amicus Parties Have a Critical Stake in the Outcome of the Reporters Case

The Reporters' opinions, if allowed to stand, would require federal agencies to disclose state and local criminal history records in a manner contrary to the Amicus

parties' standards and laws.^{4/} In addition, the opinions, if allowed to stand, could have profound and adverse consequences upon the established system under which state criminal history record repositories share criminal history record information with the FBI.

State criminal justice agencies, usually the state's criminal history record repository, transmit felony and certain misdemeanor arrest and conviction information to the FBI as required by state law or policy.

^{4/} SEARCH has adopted model standards for state legislation governing the collection, maintenance, use and confidentiality of criminal history records. SEARCH's standards do not apply to chronologically arranged non-name indexed original records of entry. SEARCH's confidentiality standards call upon the states to protect criminal history records, and particularly non-conviction record information, from access by the press and the public. SEARCH, Technical Report No. 13, Standards for Security and Privacy of Criminal Justice Information (1978).

In a few states the FBI also obtains criminal history record information directly from local law enforcement agencies. Once obtained, this information is maintained by the FBI's Identification Division. At present, the Identification Division's database is the only national criminal history record database. However, the FBI and the states are currently testing a decentralized system for the interstate exchange of criminal history records. This system, called the Interstate Identification Index ("III"), consists of a computerized index at the FBI containing only personal identification data about individuals, including the individuals' fingerprint records, and an identification of the state or states (or the FBI, for federal offenders) maintaining a criminal history record about the individual. The III will

serve as a pointer to refer authorized requestors to the state or federal files where a complete criminal history record about the inquired upon individual is maintained.

It is likely that if the Reporters decision stands, many states would be compelled to reconsider the amount or nature of criminal history record information that they presently share with the FBI. In addition, many states may have to consider terminating their participation in the III. States and criminal history record repositories which failed to curtail their information sharing relationship with the FBI would be placed in the unenviable position of facilitating the circumvention of the confidentiality strictures in their own state law.

III. ARGUMENT

A. Criminal History Records Are Not on the Public Record

In its first opinion, the court of appeals reasoned that if criminal history record information was truly "on the public record" then the record subject's privacy interest, while not eliminated entirely, would be weakened considerably and the privacy interest/public interest balance affected accordingly. 816 F.2d at 739. However, the court of appeals explained that by using the term public record it meant that a more or less formal policy determination had been made that the information in question should be publicly available and that a mechanism be in place to accomplish this availability.

The phrase 'public record' implies, we believe, a good deal more than that the information be available. It means that a local, state or federal political body has made an affirmative determination that criminal records must be freely available to the general public and has provided a mechanism to ensure the implementation of that policy. *Id.* at 740.

The court of appeals abandoned this standard in its second opinion. Instead, the majority concluded that official law and policy with respect to disclosure is irrelevant and, rather, the only germane determination is whether as a "factual matter" the information is available. 831 F.2d at 1127.

We think that the court of appeals came closer the first time to identifying the considerations relevant to whether records submitted to federal agencies have previously been placed on the public record. As discussed below, other courts that have considered the effect of a prior release on an agency's entitlement under FOIA to withhold previously released data have found that the key question is whether there has been an official determination to release the data. Moreover, in assessing whether information is in fact available, it is surely relevant whether there is a mechanism in place that works effectively to make the information in question available. With respect to criminal history records, there is neither an effective mechanism to make the records publicly

available nor an official policy in support of public availability.

1. As a Practical Matter, Criminal History Records Are Not on the Public Record

The majority below seemed to assume that if original source records are publicly available by law then it follows that a requestor can obtain criminal history records merely by going to the original source for the information. In fact, nothing could be further from the truth.

Rap sheets maintained by state criminal history record repositories may consist of entries describing numerous arrests made over several years by law enforcement agencies in

many different jurisdictions and states. Rap sheets may also include information about charges filed by prosecutors in many different jurisdictions and states. Rap sheets may further contain dispositions relating to these various arrests and charges, and describing adjudicatory actions over several years, in different courts and in different jurisdictions and states. Finally, rap sheets may include correctional information that provides an historical account of correctional events stretching over several years and including entries from correctional agencies in different jurisdictions and states.^{5/}

^{5/} An example of the contents of an FBI rap sheet is found in SEARCH, Technical Report No. 14, The American Criminal History Record: Present Status and Future Requirements (1976), at 4.

Original source documents are different. For one thing, not all of the types of information included in a rap sheet are publicly available from their original sources. For example, correctional information customarily is not publicly available from the jail or correctional institution that is the source of the data. Similarly, charging information is generally not publicly available from the prosecutorial agency that is the source of the data.

Two types of primary source documents -- sometimes called original record of entry documents -- are customarily available to the public. First, virtually every police department keeps a daily record of arrests and other events involving police action. The title and character of these records varies

some from department to department, but usually these records include a blotter or log of calls to the department for assistance; incident or offense reports filed by police officers responding to these calls; and an arrest log or blotter identifying those individuals arrested or formally detained at the station house, along with a brief description of the reason for the arrest or detention.^{6/}

These daily records often are not available to the public by the names of record subjects and seldom, if ever, are available to the public on a cumulative basis -- i.e., the daily records do not contain or cross reference all of an individual's arrests or

6/ SEARCH, Privacy and Security of Criminal History Information: Privacy and the Media,
Bureau of Justice Statistics (1979) at 17.

encounters with a particular police department. Rather, to obtain an individual's total record of encounters with a particular agency each day's record would have to be searched. By statute or case law in most states, and by tradition in every state, the chronological version of these daily blotters and logs are available to the public.^{7/}

Second, every court keeps a record, usually called a docket, of events occurring in that court. The docket includes records of arraignments, adjudications, sentences, and other judicial events. Customarily, these

^{7/} Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. 1984), is representative of the decisions that have dealt with the availability of police blotter data. In Heard, a Texas state appellate court held that under Texas' Open Records Law, most parts of a police offense report must be made available to the public and the press. See also, for example, Cal. Gov't Code § 6254(f).

records are indexed, or at least cross indexed, by the names of the parties. Occasionally, these records are cumulative, i.e., all of the events in a given court, even events involving different cases, in which a particular individual participated can be obtained by searching under that individual's name.^{8/} Moreover, increasingly, courts are automating their docket systems. However, even with respect to the most advanced court docket systems, access to the system merely provides a requestor with information about events that occurred in that court -- not in other courts. As a matter of constitutional

^{8/} SEARCH Report, National Conference on Data Quality and Criminal History Records: Strategies for Improvement, Proceedings of a BJS/SEARCH Conference (Nov. 1986) at 23, 30 and 42; and Polansky "Computer Technology in the Courts," Legal and Legislative Information Processing, Greenwood Press (1980), at 201-5.

right, statute law or court rule, dockets are open to public inspection in every state.^{9/}

Indeed, even getting this one limited "piece of the puzzle" is something of an accomplishment. A requestor must know (or guess correctly) that the record subject in question has had contact with a particular police department or court. Moreover, if the police department or court does not compile its original source documents by name, or does not cross-index by name, (as is often the case) then the requestor must not only know the name of the record subject and the agency that is likely to be maintaining a source document, but the requestor must also know the date on which the event occurred or the docket

or offense number under which the entry is filed.

Thus, when the court of appeals' majority directed the district court to make a "factual determination" whether information in a rap sheet is available from original source documents, they posed a specious question. 831 F.2d 1124, 1127. There is no "factual determination" that a district court need make with respect to whether the various pieces of information in a rap sheet are available to the public at their original sources. The answer to this question, in virtually every jurisdiction in the country, is that some, but by no means all of the types of information in a criminal history record, are indeed publicly available from original sources

^{9/} See, for example, Cal. Gov't Code, §§ 69842-69847 (Superior Courts) and §§ 71280.1-71280.3 (Municipal Courts).

However, this answer fails to address the real issue -- does the availability of such information from various original sources make any difference from a privacy standpoint? Does such availability really mean that an individual's privacy interest, in any meaningful sense, has faded? The answer, most surely, is no. In the real world, criminal history records are not on the public record even though, theoretically, some of the component parts of the record are publicly available from original sources.^{10/}

^{10/} In Washington Post Co. v. United States Department of State, 647 F.2d 197, 200 (D.C. Cir. 1981) (Lumbard, J. concurring), rev'd on other grounds, 456 U.S. 595 (1982), the concurring opinion argued that in determining whether a "public record" is available under FOIA, courts should take into account the fact that the information in question is difficult to obtain.

2. As a Policy Matter, Criminal History Records Are Not on the Public Record

Not only are state and local criminal history records unavailable as a practical matter, these records are also unavailable as a matter of state law. The court of appeals' first opinion reasoned that a determination of whether records have been placed on the public record turns primarily on whether the relevant law affirmatively places the records on the public record. Other courts have reached the same conclusion.^{11/}

^{11/} In Safeway Stores Incorporated v. Federal Trade Commission, 428 F. Supp. 346, 347 (D.D.C. 1977), Judge Gesell held that the Federal Trade Commission could withhold an agency report under an applicable FOIA exemption even though the report had possibly been leaked to the Washington Post.

Publication by the
Washington Post was
(footnote continued)

In the instant case, state and local agencies have not placed criminal history records on the public record because the law and regulations that control their handling of

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unauthorized by the Commission and any staff disclosure, if it occurred, was prohibited under 15 U.S.C. § 50. A close reading of the Washington Post article, moreover, raises considerable doubt that the Post ever had full access to the report. In any event, an unauthorized "leak" does not constitute a waiver of the (b)(5) exemption. Id. at 347.

See also, Murphy v. Dept. of the Army, 613 F.2d 1151, 1155 (D.C. Cir. 1979), (holding that an exemption can be asserted under FOIA even though the record had been disclosed to Congress because the applicable law authorizes such disclosure). Laborers' Internat'l Union of North America v. United States Dep't of Justice, 578 F. Supp. 52, 58 (D.D.C. 1983) (holding that an unauthorized leak of an agency report does not prevent the agency from withholding the report under Exemption 7(C)); Murphy v. Federal Bureau of Investigation, 490 (footnote continued)

criminal history records make such records unavailable to the public. Indeed, from the very outset, policy makers, legislatures and the courts have recognized what seems to have escaped the court of appeals' majority -- that criminal history records and original records of entry are very different types of records that serve very different purposes.

Unquestionably, the public has a legitimate interest in individuals who are arrested or indicted, and a right of access to information concerning crime in the community.

Branzburg v. Hayes, 408 U.S. 665, 695 (1972); Houston Chronicle Publishing Company v. City of Houston, 531 S.W. 2d 177, 186, 187 (Tex.

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F. Supp. 1138, 1143 (D.D.C. 1980), (holding that leaks of an ABSCAM report do not affect the FBI's entitlement to withhold records under Exemption 7).

Civ. App. 1975) application for writ of error refused, 536 S.W. 2d 559 (Tex. 1976); Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975). In recognition of this interest, police blotter records and, particularly court docket records, historically have been public in the United States. Their public status is intended to guard against secret arrests and "star chamber" proceedings, and to ensure that the public is informed as to the nature of criminal proceedings, usually through the press.^{12/}

By contrast, criminal history record systems were created by police agencies to serve law enforcement and other criminal

^{12/} SEARCH, Technical Report No. 13, supra, note 4.

justice purposes. Until the mid to late 19th century, criminal history record "systems" in the United States consisted of little more than random and informal notes kept by police officers in a few urban centers.^{13/} By the early 20th century law enforcement agencies had begun to compile criminal history records in a more formal way and maintain these records in connection with fingerprint and other identification data.^{14/}

These early criminal history records were viewed as the property indeed, in a sense, as

^{13/} Office of Technology Assessment, An Assessment of Alternatives for a National Computerized Criminal History System, (1981) at 21 (hereafter "OTA Study").

^{14/} SEARCH, Criminal Justice Information Policy: Intelligence and Investigative Records, Bureau of Justice Statistics (1985) at 16-17; Laudon, Dossier Society, Columbia Univ. Press (1986) at 32-36, (hereafter "Laudon").

the "personal notes", of police officers and their agencies. Accordingly, decisions to create such records; maintain such records; use such records; or disclose such records, were regarded, more or less exclusively as matters of police discretion. Well into the mid-1960s, criminal history records in most states were exempt from open record or official record laws. A 1971 survey found that, in general, arrest records were disclosed or, more often, withheld solely at police discretion.

Courts usually refuse to interfere with the police practice of limiting public access to arrest records but circulating the records at their discretion.^{15/}

^{15/} "Retention and dissemination of arrest records: Judicial Response," 38 U. Chi. L. Rev. 850, 863 (1971).

Early court challenges to police departments' selective release of criminal history records were rebuffed on the grounds that the records were not confidential at common law or by statute.^{16/}

By the late 1960s and early 1970s the exercise of police discretion selectively to disclose criminal history record information outside of the criminal justice system was under attack. The basis for the attack included concerns about the computerization of criminal history record information; the potential for misuse of the records by non-

^{16/} Norman v. City of Las Vegas, 177 P.2d 442, 445-8 (Nev. 1947), (upholding the selective release of criminal history data to employers); and Hoag v. Superior Court, 24 Cal. Rptr. 659, 665 (Cal. Dist. Ct. App. 1962), (rejecting a claim that a police officer's public display of photographs of individuals with convictions and arrest records was an invasion of privacy.)

criminal justice recipients; the poor quality of the records; and the unfairness to record subjects arising from selective release of criminal history and especially nonconviction data. These concerns created a climate in which selective, discretionary release of criminal history records was politically unacceptable.^{17/} Indeed, as early as July 1970, Project SEARCH, the predecessor to SEARCH, published a report calling attention to the emergence of formal and automated criminal history record systems and the threat that such systems pose to personal privacy.^{18/}

^{17/} Marchand, The Politics of Privacy, Computers and Criminal Justice Records, Information Resource Press (1980) at 148-150; Report of the Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Dept. of Health, Education and Welfare, Records, Computers and the Rights of Citizens (1973), at 222-243.

^{18/} SEARCH, Technical Report No. 2, Security (footnote continued)

In 1973, Congress took an initial step toward assuring that criminal history records maintained in state and local information systems would be unavailable to the public. The Crime Control Act of 1973 required that criminal history records in state and local information systems that received federal monies [and by then virtually all state and most large, local systems had received federal monies through the Law Enforcement Assistance Administration ("LEAA") "only be used for law enforcement and criminal justice and other lawful purposes."^{19/}

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and Privacy Considerations in Criminal History Information Systems, (1970).

^{19/} Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789(b)(1982), as amended by § 524(b) of the Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197 (1973).

In 1976, the LEAA issued implementing regulations.^{20/} Importantly, the federal regulations do not apply to original records of entry, such as police blotters, if maintained on a chronological basis, nor to court records of public judicial proceedings or published court opinions.^{21/} Instead, they apply only to name indexed, cumulative criminal history records. The regulations require state and local agencies to withhold from the public arrest records without dispositions, if more than a year has elapsed since the date of arrest and the record does not indicate that the case is actively pending, and all types of dispositions favorable to the record subject, such as

^{20/} 28 C.F.R. Part 20 (1987).

^{21/} 28 C.F.R. § 20.20(b)(3), (4) (1987).

dismissals and acquittals, unless state law provides otherwise.^{22/}

Today, every state but three, makes a sharp distinction in disclosure policy between criminal history records and original records of entry. Only Florida, Wisconsin and Oklahoma make criminal history records freely available to the public and, even then, criminal history records obtained by criminal history record repositories in these states from out-of-state sources are unavailable to the general public.^{23/}

Criminal history record statutes in the other 47 states base their dissemination

^{22/} 28 C.F.R. § 20.21(b)(1)(2) (1987).

^{23/} Fla. Stat. Ann. §§ 1109, 943.053; Wis. Stat. Ann. § 1935; and Okla. Stat. Ann., Tit. 51, § 24A8.

policy on whether the criminal history data is conviction or nonconviction data. Conviction data, although generally unavailable to the public, is often available to governmental non-criminal justice agencies and even private employers. In general, conviction data is far more available outside the criminal justice system than is nonconviction data.^{24/} By contrast, in all 47 states nonconviction data cannot be disclosed at all for noncriminal justice purposes, or may be disclosed only in narrowly defined circumstances, for specified purposes.^{25/}

^{24/} See, for example, Ga. Code, §§ 35-3-34, 35-3-35; Hawaii Rev. Stat. Ann. § 846-9; Me. Rev. Stat. Ann. § 16-615; Mo. Rev. Stat. § 610.120; Neb. Rev. Stat. §§ 29-3520, 3523; Ore. Rev. Stat. § 181.560.

^{25/} See, for example, Conn. Gen. Stat. Ann. § 54-142n; Ga. Code Ann. §§ 35-3-34, 35-3-35; Hawaii Rev. Stat. Ann. § 846-9; Me. Rev. Stat. Ann. § 16-615; Neb. Rev. Stat. § 29-3523.

These specified noncriminal justice purposes may include licensing or public or private employment screening, but in many cases only if the requestor can cite separate legal authority to obtain and use the records, such as a licensing statute.^{26/} Often this supporting legal authority must be "express" or "specific"^{27/} or must refer to criminal conduct or to criminal records and must set out requirements, exclusions or limitations based upon such conduct or records.^{28/} As a further limitation, statutes in some states

^{26/} Del. Code Ann. § 11-8513(b)(1); Hawaii Rev. Stat. Ann. § 846-9(5); Ill. Stat. Ann. § 38-206-7; Ind. Stat. Ann. § 5-2-5-5; N.C. Gen. Stat. § 114-19.1.

^{27/} Ariz. Rev. Stat. Ann. § 41-1750.G; Ark. Stat. Ann. § 5-1102; Me. Rev. Stat. Ann. § 16-613.

^{28/} Conn. Gen. Stat. Ann. § 54-142n; Ill. Stat. Ann. § 38-206-7; Pa. Cons. Stat. Ann. §§ 18-9124, 9125; Va. Code Ann. § 19.2-389.A (ii), (vii).

provide that criminal history records may be released for licensing or employment purposes only for occupations involving the public safety or the custody of children or valuable property or information.^{29/}

In still other states, the statute delegates the authority to release criminal history records for noncriminal justice purposes to a designated official or board.^{30/} Surveys undertaken by SEARCH reveal that policies adopted by these officials or boards, pursuant to statutory authority, typically permit the release only of conviction records for noncriminal justice purposes and require applicants to show a need for the information

^{29/} Ga. Code 1981 § 35-3-34, 35; Wash. Rev. Code Ann. § 43.43.815.

^{30/} Md. Ann. Code of 1957, § 27-546; S.D. Cod. Laws Ann. § 23-6-14.

based upon separate legislative authority, executive order or court order.^{31/}

The courts, like the legislatures, have also distinguished sharply between criminal history records and original records of entry. In Houston Chronicle Publishing Co. v. City of Houston, 531 S.W. 2d 177, 186-7 (Tex. Ct. App. 1975), for example, a Texas state court ruled that the public has a First Amendment right of access to certain chronologically arranged factual data, such as that contained in a police blotter and the first page of an offense report, insofar as it supplies basic

^{31/} SEARCH, A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of the Interstate Identification System for Noncriminal Justice Purposes, Federal Bureau of Investigation, National Crime Information Center (1984) (hereafter "FBI Study").

information about an arrest.^{32/} However, the court denied public access to a record subject's rap sheet, noting that the access rights must be balanced against other competing interests, including the interest in privacy.

The constitutionally protected access of the press and public to the limited Offense Report, as described herein, should be made immediately available at a convenient 'central location' to meet the need

^{32/} In Holcombe v. State, 200 So. 739, 746 (Ala. 1941), the Alabama Supreme Court held that jail dockets and records which contain information describing each prisoner received into a local jail, their age, sex, identifying characteristics, and the charge or offense are public records and could be inspected by a newspaper reporter. In Dayton Newspaper Inc. v. City of Dayton, 341 N.E.2d 576, 578 (Ohio 1976), the Ohio Supreme Court held that a city jail log, which listed arrest numbers, names of prisoners, charges, dates, times, and dispositions was a public record and must be disclosed to a newspaper.

of the public's right to know.

The Personal History and Arrest Record is an entirely different matter. This record, or 'rap sheet', consists of the criminal history of the individual, insofar as it shows each previous arrest and other data relating to the individual and the crimes he has been suspected of committing.

* * *

A holding that the Personal History and Arrest Record must be open to inspection by the press and public would contain the potential for massive and unjustified damage to the individual. Id. at 187-88.

Similarly, in New Bedford Standard-Times Publishing Co. v. Clerk of the Third District Court of Bristol, 387 N.E.2d 110, 116 (Mass. 1979), the Supreme Judicial Court of

Massachusetts upheld a statutory scheme which made the courts' chronological record of criminal proceedings publicly available but which made the courts' alphabetical name index of such proceedings confidential.

It is clear enough that most court records do not aggregate information concerning the criminal history of an individual, and therefore do not threaten the privacy interests the Act seeks to protect. The alphabetical index, on the other hand, listing offenses charged and dispositions for each individual, provides aggregated information similar to that regulated by the Act. It is therefore appropriately subjected to limitation to reinforce the regulation of CORI. It has not been shown that the limitation in question exceeds permissible limits or invades any constitutional

right of the plaintiff.
Id. at 176.

B. Public Availability of Criminal History Records Threatens Significant Privacy Interests

As discussed above, we believe that the majority in Reporters erred because it failed to recognize that criminal history records are not on the public record, both as a matter of administrative practice and as a matter of applicable law. In addition, we believe that the majority erred because it failed to appreciate that even if all of the component parts of a criminal history record were effectively available to the public -- which they most certainly are not -- the damage to a record subject's privacy interest from release of a criminal history record is different from

and more serious than the damage to a record subject's privacy interest from release of any one or more of the original records of entry. The availability of original records of entry is not, as the majority implies, "tantamount" to making criminal history records available. 831 F.2d at 1127.

The majority resisted engaging in an analysis of the privacy threat posed by release of criminal history records on the grounds that the Congress, unlike state legislatures, has not adopted legislation expressly making criminal history records confidential. Id. at 1127. However, the courts' obligation under Exemption 7(C) to weigh the privacy interest in confidentiality against the public interest in disclosure is precisely the process that has led state

legislatures to conclude that criminal history records, unlike original records of entry, must be confidential.

In this regard three considerations are especially relevant: (1) disclosure of a criminal history record is more intrusive than disclosure of one or more source documents because a criminal history record provides a comprehensive and detailed history of an individual's criminal career that may often include references to old and no longer timely events; (2) release of criminal history records held by the FBI is more likely to harm record subjects than release of source documents because the FBI's criminal history records are a compilation of many different pieces of data from many different sources, and are therefore more likely than original

source documents to be inaccurate or incomplete; and (3) a request for a criminal history record based merely on the name of the record subject is more likely to result in the disclosure of information about the wrong person than is a request for an original record of entry.

The courts have long recognized that one of the interests protected by privacy is an individual's interest in avoiding the public disclosure of a comprehensive and detailed profile of the individual's activities.^{33/} A

criminal history record provides precisely this kind of comprehensive and detailed picture of an individual's activities in the criminal sphere. If an individual's criminal history record is placed in the public domain, an individual's entire life with respect to contact with the criminal justice system is available for inspection by business associates, neighbors, or any member of the public on the basis of nothing more than mere curiosity. By contrast, original source documents disclose merely one isolated event relating to an individual's contacts with the criminal justice system. Accordingly, release of criminal history data, as opposed to release of an original record of entry, presents a far more serious threat to an

^{33/} For example, in Doe v. Webster, 606 F.2d 1226, 1238, 1239 n. 49 (D.C. Cir. 1979) the D.C. Circuit cited several federal court opinions in which the systematic recordation and dissemination of information about individuals was found to implicate privacy interests. The court concluded "Partly for these reasons, the need to restrict the dissemination of criminal records is becoming more and more recognized." Id.

individual's interest in protecting his privacy.^{34/}

Disclosure of a criminal history record also entails an increased risk of disclosing records which relate to "old" arrests or other "old" criminal justice events. By contrast, there is less risk of obtaining an aged entry

^{34/} In United States Department of State v. The Washington Post Company, 456 U.S. 595, 602 n.5 (1982), this Court held that the State Department's disclosure under FOIA of records indicating that certain Iranian nationals held United States passports might implicate the privacy interests protected by Exemption 6. This Court reached this conclusion notwithstanding the fact that citizenship information is a matter of public record. One lesson from the Court's analysis in Washington Post is that even non-intimate, public record information may present a threat to privacy when combined with other pieces of information.

See also, Fiumara v. Higgins, 572 F. Supp. 1093, 1109 (D.N.H. 1983), in which a federal district court upheld the use of Exemption 7(C) to withhold criminal history records.

from an original record of entry because the requestor must know the date or at least the period of time in which the underlying event occurred, and the entry must still be retrievable.

Public disclosure of old criminal history data implicates privacy interests because such data is unlikely to be reflective of the individual's current character or conduct. Empirical research, for example, indicates that records of an old arrests or convictions are not likely to be reflective of an individual's character or conduct.^{35/}

^{35/} A Bureau of Justice Statistics report found that most recidivism, "occur[s] within the first three years after release: an estimated 60 percent of those who will return to prison within 20 years do so by the end of the third year." Bureau of Justice Statistics Special Report: Examining Recidivism (February, 1985) at 1-2. A 1988 (footnote continued)

In evaluating the extent to which individuals have a privacy interest in criminal history records, the courts have been sensitive to the special privacy threat posed by old records.

In Woolston v. Readers Digest, 443 U.S. 157, 168 (1979), for example, this Court held that after 20 years an individual is no longer a public figure by virtue of a conviction record.

(footnote continued from previous page)
study by the Massachusetts Department of Corrections similarly found that recent conviction information has a strong predictive value with respect to future criminality but that older criminal history record information has virtually no predictive value. Massachusetts Department of Corrections, Statistical Tables Describing the Background Characteristics and Recidivism Rates for Releases From Massachusetts Correctional Institutions During 1985, (1988) at 7-9.

This reasoning leaves us to reject the further contention that . . . any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on the limited range of issues relating to his conviction.

* * *

To hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime. Id. at 168.

In Natwig v. Webster, 562 F. Supp. 225, 231 (D.R.I. 1983), a federal district court ordered the purging of a 15 year old arrest record, in part on the grounds that the record subject had been free of involvement with the criminal justice system since his arrest, and the record therefore was no longer reflective of his character.

Similarly, in Briscoe v. Readers Digest Association, 93 Cal. Rptr. 866, 873-4 (1971) the California Supreme Court upheld an invasion of privacy claim against Readers Digest for publishing an article that revealed that eleven years earlier the plaintiff had been convicted for the hijacking of a truck. The court reasoned:

[i]t would be a crass legal fiction to assert that a man once public never becomes private again . . .

Plaintiff is a man whose last offense took place 11 years before, who has paid his debt to society, who has friends and an 11 year old daughter who are unaware of his early life -- a man who assumed a position in "respectable society." Id. at 873-74.

The second factor that makes the public availability of criminal history records under FOIA, as opposed to the public availability of original records of entry, a far more serious privacy threat relates to the nature of criminal history records maintained by the FBI.

Low disposition reporting rates at the FBI are widely conceded to be a problem. Studies of the rate of disposition reporting to the Identification Division indicate a very substantial shortfall. For example, a 1980 study by the Jet Propulsion Laboratory, undertaken for the FBI, found that the Identification Division received dispositions for only about 45 percent of reported

arrests.^{36/} A report by the Office of Technology Assessment also found problems. According to OTA, approximatley 30 percent of the Identification Division's arrest entries as of 1980 lacked available court dispositions.^{37/} Some of the research conducted for OTA's 1980 survey, but not published as part of the OTA report, found even lower disposition reporting rates in the range of 60 percent of arrest entries without available court dispositions.^{38/} Further, a SEARCH/Bureau of Justice Statistics conference involving repository directors, court administrators, congressional officials, and

FBI officials, held in September of 1984, heard reports that the Identification Division's disposition reporting problem is more severe than many surveys indicate and that perhaps over 50 percent of available dispositions do not get reported to the FBI.^{39/} Further, the OTA Study compared the information in the FBI's criminal history records with information from the original source documents on which the criminal history record entries were based and found that approximately 20 percent of the FBI entries contained material inaccuracies.^{40/}

^{36/} Jet Propulsion Laboratory, FBI Fingerprint Identification Automation Study; AIDS III Evaluation Report, Volume 5; Environmental Analysis unpublished monograph (Nov. 15, 1980), at A-3.

^{37/} OTA Study, supra note 13 at 92.

^{38/} Laudon, supra note 14 at 137.

^{39/} SEARCH, Criminal Justice Information Policy: Data Quality of Criminal History Records (1985) at 23-24.

^{40/} OTA Study supra note 13 at 91.

By contrast, original records of entry are created by the very agency that is responsible for the event described in the entry. Accordingly, most experts believe that original records of entry are more likely than criminal history records to contain an accurate description of an event. Moreover, an original record of entry does not purport to be complete and, accordingly, does not require the reporting of available dispositions. For these reasons, release of FBI held criminal history records to the public entails a greater risk of disclosing inaccurate or incomplete information than does the release of original records of entry. Courts have found that the government's release of inaccurate or incomplete personal

information involves a serious threat to an individual's privacy interests.^{41/}

^{41/} For example, in Tarlton v. Saxbe, 507 F.2d 1116, 1124 n.23 (D.C. Cir. 1974), the D.C. Circuit stated:

government collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a leveling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment

And see, Sullivan v. Murphy, 478 F.2d 938, 965, cert. denied, 414 U.S. 880, (1973); United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967); Wilson v. Webster, 467 F.2d 1282, 1284 (9th Cir. 1972); Bilick v. Dudley, 356 F.Supp. 945, 952-3 (S.D.N.Y. 1973); Kowall v. United States, 53 F.R.D. 211, 214-5 (W.D. Mich. 1971); Wheeler v. Goodman, 298 F.Supp. 935, 942 (W.D.N.C. 1969); Hughes v. Rizzo, 282 F.Supp. 881, 885 (E.D. Pa. 1968).

A third privacy threat posed by the public release of criminal history records is the increased risk that the records that are released will not relate to the subject of the request. The release of a wrong record may do serious and inappropriate harm to both the subject of the request and the subject of the record. Under the majority's opinion, it seems likely that federal agencies would be required to provide criminal history records to the public solely on the basis of a record subject's name, and without benefit of a record subject's fingerprints, or even biographical data or other descriptions.

Studies show that when agencies attempt to obtain criminal history records on the basis of "name only" information agencies sometimes retrieve records that do not relate

to the individual who is, in fact, the subject of the request.^{42/} The explanation, of course, for these cases of misidentification is that many surnames are identical or similar and that many individuals who are the subject of criminal history record checks use aliases. Partly for this reason, some state criminal history record statutes and the SEARCH standards prohibit the release of rap sheet data to otherwise authorized non-criminal justice agencies except on the basis of fingerprint comparison.

By contrast, when a member of the public seeks access to a source document, the chance of obtaining information about the wrong individual is minimal. A requestor cannot obtain information from a source document

^{42/} SEARCH, FBI Study, supra at 57, note 31.

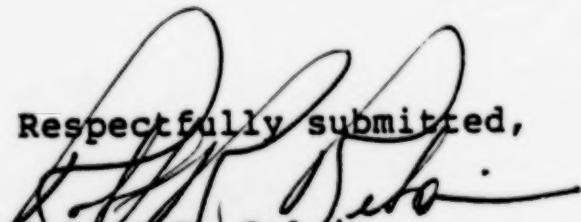
unless the requestor already knows a good deal about the record subject. For example, a requestor must know the agency or court with which the record subject had contact; the requestor must know at least the approximate dates on which the contact occurred; and often times, the requestor must know the docket number or other identification number under which the event is recorded.

Not surprisingly, the courts have had no trouble finding that privacy type interests are implicated when the government takes action on the basis of information about the wrong person.^{43/}

^{43/} For example, in McCollan v. Tate, 575 F.2d 509, 511 (5th Cir. 1978), the Fifth Circuit held that an individual arrested on the basis of a misidentification by a sheriff's office may have a basis for a Section 1983, false imprisonment action.

CONCLUSION

For all of the reasons set forth above, the Amicus Parties urge the Court to reverse the court of appeals and to find that a federal agency's assertion of Exemption 7(C) to withhold criminal history records is not compromised because some of the component parts of the record are publicly available at their source; and further to find that the public availability of criminal history records threatens significant privacy interests.


Respectfully submitted,

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APPENDICES

- A. Letters of Consent to the
Filing of the Brief Amici
Curiae
- B. Identification of Amici Curiae
- C. Certificate of Service by
Counsel of Record

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APPENDIX A

**Letters of Consent to the Filing of
the Brief Amici Curiae**

U.S. Department of Justice
Office of the Solicitor General



Washington, D.C. 20530
June 15, 1988

Robert R. Belair, Esq.
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Re: Department of Justice v. Reporters' Committee
for Freedom of the Press, No. 87-1379

Dear Mr. Belair:

I hereby consent to the filing of a brief amicus curiae in
the above case on behalf of Search Group, Inc. and agencies of
the States of New York and Massachusetts.

Sincerely,

Charles Fried
Charles Fried
Solicitor General

cc: Joseph F. Spaniol, Jr., Esquire
Clerk
Supreme Court of the United States
Washington, D.C. 20543

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TODAY ADMITTED IN DC

June 8, 1988

Robert R. Belair, Esq.
1800 M Street, N.W.
Washington, D.C. 20036

Re: United States Department of Justice v. Reporters
Committee for Freedom of the Press, No. 87-1379

Dear Mr. Belair:

This letter will serve to confirm that Respondents in the above-captioned case consent to the filing of an amicus curiae brief on behalf of Search Group, Inc. I would appreciate it if you would serve us by hand when you file your brief.

Very truly yours,

Paul Mogen
Paul Mogen

PM/kdd

APPENDIX B

Identification of Amici Curiae

IDENTIFICATION OF THE AMICI CURIAE

SEARCH Group, Inc. ("SEARCH") was established in 1974 and is a not-for-profit corporation organized under the laws of the State of California. SEARCH is governed by a Membership Group comprised of governors' appointees from each state. In most cases, the appointees are responsible for the operation of the agencies in their states which collect, maintain and disseminate, as authorized, criminal history records and related identification information. Generally these agencies are referred to as "criminal history record repositories".

The Division of Criminal Justice Services of the State of New York is responsible for operating New York's criminal history record repository. As part of this responsibility, the Division is charged, among other things, with ensuring that only "qualified agencies" have access to information held by New York's criminal history record repository. N.Y. Executive Law § 837(6) (McKinney, 1982). Moreover, Section 837(8) of the New York Executive Law imposes on the Division a duty to "adopt appropriate measures to assure the security and privacy of [criminal history record information]." Under New York law, it could be unlawful for a state official to disclose criminal history records to any agency or person, for any purpose not authorized by law.

The Kentucky Justice Cabinet, through the Department of State Police, is responsible for

the direct control and supervision of the centralized Criminal History Record Information System in the Commonwealth of Kentucky. Kentucky law bars the state police from allowing public inspection of centralized criminal history records. K.R.S. 17.150 0(4).

Don Edwards (D. Calif.) is a Member of Congress and Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. As the chairman of the subcommittee with oversight and legislative responsibilities for the Federal Bureau of Investigation on matters involving criminal history records, he is vitally interested in protecting the privacy interests of the subjects of criminal history records held by the FBI.

APPENDIX C

Certificate of Service by Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief of Amici Curiae SEARCH Group, Inc., the State of New York, Division of Criminal Justice Services, the Commonwealth of Kentucky, Justice Cabinet, and United States Congressman Don Edwards to be served by first class mail postage prepaid upon:

Counsel of Record for
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CLERK

In The
Supreme Court of the United States

October Term, 1987

—
UNITED STATES
DEPARTMENT OF JUSTICE ET AL.,

Petitioners,

vs.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS ET AL.,

Respondents.

—
**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

—
**AMICUS CURIAE BRIEF OF THE STATE OF
CALIFORNIA IN SUPPORT OF PETITIONERS**

—
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INTEREST OF AMICUS CURIAE

The State of California, by its Attorney General John K. Van De Kamp, respectfully submits this brief as amicus curiae pursuant to Supreme Court Rule 36.4.

Amicus voluntarily provides criminal history information to the Federal Bureau of Investigation with the understanding that this information will remain confidential and be used for law enforcement purposes only.

The Attorney General of California is responsible for the security of criminal offender information and is specifically charged with guarding against unauthorized disclosures of information and insuring this information is disseminated only on a need-to-know basis. He is additionally responsible for the coordination of the interstate exchange of criminal offender record information. (Cal. Pen. Code, § 11077.)

Additionally, California case law and article I, section 1 of the California Constitution recognize the right to privacy as an inalienable right of the individual. (See *White v. Davis*, 13 Cal.3d 757, 773-775 (1975).) The California courts have found the official detention and dissemination of criminal history information to be an incursion into the right of privacy but they have tolerated this incursion on the grounds it was justified by a compelling state interest in law enforcement. (*Loder v. Municipal Court*, 17 Cal.3d 859, 864-868 (1976); *Central Valley Chap. 7th Step Foundation v. Younger*, 95 Cal.App.3d 212, 236 (1979).)

FBI disclosure of State criminal history information pursuant to the Freedom of Information Act threatens not only the individual privacy rights of individual Californians but also threatens to undermine the California courts' tolerance of this limited incursion into the individual's sphere of privacy. It further threatens to undermine the national system for the sharing of criminal history information.

SUMMARY OF ARGUMENT

The FBI acts as a repository and clearing house for criminal offender information voluntarily submitted by the States. Pursuant to Federal law, the FBI disseminates this information on a confidential basis. The laws of many states which compile and submit criminal offender information to the FBI prohibit the public disclosure of the information in these compilations.

The proposition that in passing the Freedom of Information Act (FOIA), Congress impliedly repealed Federal law and disregarded state laws restricting public access to these records is unfounded. Compelling the FBI to disclose this information in response to FOIA requests endangers the present system of sharing Federal and State criminal offender information.

The FOIA exempts federal agencies from disclosing information which would result in "an unwarranted invasion of personal privacy." These exemptions protect the individual's privacy interests in restricting government's collection and dissemination of personal information about private citizens. These privacy rights are recognized by the laws and courts of the states and federal decisional law and should not be confused with the more restrictive privacy rights protected by the constitution and evolving tort law.

The disclosure of criminal offender information in response to "name check" requests is contrary to FBI quality control procedures and contains an inherent risk of misidentification or misinformation which would invade an individual's privacy by placing him in a false light. This risk of injury to individual privacy constitutes an unwarranted invasion of individual privacy within the meaning of the FOIA exemptions.

ARGUMENT

I

THE FREEDOM OF INFORMATION ACT¹ DOES NOT AUTHORIZE THE FBI TO DISCLOSE CRIMINAL OFFENDER INFORMATION WHICH MANY STATES SUBMIT TO THE FBI WITH THE UNDERSTANDING IT WILL REMAIN CONFIDENTIAL

Pursuant to congressional authorization, the FBI has, since 1924, maintained criminal identification records for the benefit of the national community of criminal justice agencies as well as for the courts and penal institutions. These agencies make inquiries and receive information over a nationwide telecommunications system. (App., pp. 63, 67.)

The FBI is required by statute to exchange information with authorized agencies *with the understanding it will not be disseminated outside the receiving department or related agencies.*²

-
1. Hereinafter "FOIA."
 2. 28 United States Code section 534 provides in part:
"§ 534. Acquisition, preservation, and exchange of identification records; appointment of officials
"(a) The Attorney General shall—
"(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and
"(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(Continued on following page)

States share criminal history information with the FBI on a voluntary mutually beneficial basis. (*Menard v. Saxbe*, 498 F.2d 1017, 1021 (D.C. Cir. 1974); 28 C.F.R. § 0.85.(b).) The laws of many states allow the submission of criminal history information to the FBI only on a confidential basis and with the understanding the information will remain confidential and will be released for law enforcement purposes only.

In California, for example, criminal offender record information is to be disseminated only to agencies who are authorized by statute or law to have access to such records. (Cal. Pen. Code, §§ 11076, 11081.) The Attorney General of California is responsible for the security of criminal offender record information and is specifically charged with guarding against unauthorized disclosures of information, insuring the information is disseminated only on a need-to-know basis, and with coordinating the interstate exchange of criminal offender record information. (Cal. Pen. Code, § 11077.)

It is a crime to disseminate a criminal history record or information from a criminal history record to an unauthorized person. (Cal. Pen. Code, §§ 11141, 11142.) It is also a crime for an unauthorized person to buy, receive or possess a criminal history record or information from a criminal history record. (Cal. Pen. Code, § 11143.)

(Continued from previous page)

- (b) The exchange of records authorized by subsection (a) (2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies. . . ." (Emphasis added.)

The assumption that when Congress enacted and amended the FOIA, it repealed, sub silentio and by implication, existing federal law and disregarded existing state laws mandating the confidentiality of criminal offender information is unfounded. A repeal of this magnitude would be such a radical departure from existing practices and policies that one would expect it to be an intensely debated issue in the proceedings to adopt and amend the FOIA.

Amicus is not aware of any references to criminal history information in the legislative history of the FOIA or its amendments.³ The absence of any mention of this important issue in the legislative history means Congress never intended that the FOIA could be used to compel disclosure of criminal history information.

Congressional repeal of the confidentiality of these records should not be implied because their compelled disclosure pursuant to the FOIA does not foster the objectives of the FOIA. The purpose of the Freedom of Information Act is broad disclosure of government documents in order to insure an informed citizenry vital to an informed democracy. (*F.B.I. v. Abramson*, 456 U.S. 615, 621 (1982).) While Congress undoubtedly sought to expand the public's right of access to government information when it enacted the Freedom of Information Act, the expansion was a finite one. (*Forsham v. Harris*, 445 U.S. 169, 178 (1980).) The subjects of the FBI records in ques-

³. 94th Cong., 1st Session, FOI and Amendments of 1974, Source Book: Leg. History, Texts and other Documents, 93rd Cong., U.S. Senate, Committee on the Judiciary, Doc. No. 93-82, Freedom of Information Act Source Book: Leg. Materials, Cases, Articles.

tion are not government officials or employees. Public access to citizens' criminal history would not even remotely accomplish the FOIA's objective of informing the citizenry about the workings of the federal government.

Since such expanded access would not further any of the objectives of the FOIA, it is not plausible that Congress ever intended that the FOIA repeal existing federal law (including the Privacy Act), and FBI regulations and authorize the FBI, in violation of existing statute prohibitions, to disclose criminal history information to the public.

II

COMPELLED FBI DISCLOSURE OF STATE RAP SHEETS COULD CURTAIL THE FLOW OF INFORMATION TO THE FBI

By compromising the confidentiality of information compiled for law enforcement purposes, compelled FBI disclosure of criminal offender information could result in restricting the flow of essential information to the government. (See *F.B.I. v. Abramson*, *supra*, 456 U.S. 615, fn. 12 at 628.)

As previously noted, states share criminal history information with the FBI on a voluntary, mutually beneficial basis; the laws of many states forbid the public disclosure of criminal history information. In many states the submission of this information to other law enforcement agencies is only on a confidential basis and with the understanding the information will remain confidential and will only be disseminated for law enforcement purposes. Requiring the FBI to disclose criminal history information which states provide the FBI on a voluntary

basis could compel some states to cease providing the FBI this information and perhaps even to request the FBI to return records previously submitted to the FBI. (See App. p. 64, No. 11.)

III

CRIMINAL OFFENDER INFORMATION IN THE POSSESSION OF THE FBI IS EXEMPT FROM FOIA DISCLOSURE

The Freedom of Information Act exempts from disclosure files, the disclosure of which would constitute a *clearly unwarranted invasion of personal privacy* and records or information compiled for law enforcement purposes to the extent that their production *could reasonably be expected to constitute an unwarranted invasion of personal privacy.* (5 U.S.C. (& Supp. IV) § 552(b)(6) and 7(e); emphasis added.) The disclosure of criminal history information of an individual would constitute an unwarranted invasion of the privacy interests protected by FOIA exemptions 6 and 7(e).

These privacy exemptions of the FOIA protect an individual against the disclosure of information about him for which "he could reasonably assert an option to withhold from the public-at-large because of its intimacy or its possible adverse effects upon himself or his family." (AG's 1974 FOI Amdts. Mem., reprinted in 94th Cong., 1st Session, FOI and Amendments of 1974, Source Book: Leg. History, Texts and Other Documents, at pp. 519-520.) An arrest or a conviction stigmatizes the individual in our society to such an extent that the average individual desires to withhold their existence from the public. (Cf. *Menard v. Saxbe, supra*, 498 F.2d 1017; Cf. App., pp.

89-90.) Even respondents cannot seriously dispute that a criminal history record is the very type of record whose disclosure could adversely affect an individual or his family.*

In California the courts have long recognized that personal privacy interests include protecting individuals from the encroachment of computer technology and government data collection activities which make "cradle-to-grave profiles" of citizens possible. (*White v. Davis, supra*, 13 Cal.3d at 775.) Concern with the protection of the privacy rights of individuals includes placing appropriate restraints on the information gathering and disseminating activities of government to prevent information legitimately gathered for one purpose from being misused for other purposes or wrongfully disseminated. (13 Cal.3d at 775.)

California recognizes a privacy interest in "compiled criminal history information." It is the act of creating files on citizens and compiling information about them that impinges on the right of privacy. Controlling the collec-

4. FBI Special Agent Mercer's description of the repercussions of the disclosure of rap sheet information is noteworthy:

"Public acknowledgement of the mere existence of such a record could substantially damage the reputation of that individual, hold that individual out to public scrutiny and ridicule resulting in likely embarrassment and personal discomfort, possibly occasion either direct or indirect economic loss with respect to employment, financial opportunities, licensing, education or other such concerns, invite the imposition of social stigma, and patently constitute a clearly unwarranted invasion of his or her personal privacy." (App., pp. 81-82; emphasis added.)

tion and circulation of "personal information" is a fundamental aspect of the right of privacy. (*Id.* at 775.) In California, the State Supreme Court and the Court of Appeal have actually held that the compilation of criminal history information about arrests that do not lead to convictions is an incursion into the right of privacy justified only by the compelling state interests in law enforcement. (*Loder v. Municipal Court, supra*, 17 Cal.3d at 865-868; *Central Valley Chap. 7th Step Foundation v. Younger, supra*, 95 Cal.App.3d at 236.)

The circuit court's failure to consider the distinction between information in public records and compilations of those records threatens the privacy interests of the citizens of California.

The distinction between the original records available at their "primary source" and the criminal record information kept in the repositories in the form of indexed, cumulative records of arrests and convictions is crucial to the resolution of this case. The purposes of these original records of entry and the indexed criminal history records are different. The information found in "police blotters" and court dockets is compiled to record arrests, the filing of criminal charges and court dispositions for the purposes of the agency keeping those records. Criminal history records information, on the other hand, is compiled to give criminal justice agencies and courts as complete as possible a history of an individual's criminal career.

Because the records at issue in this case are those in the indexed form, known customarily as criminal history record information or "rap sheets," the states' treatment of these criminal history records is the more appropriate

focus of a court's inquiry when examining privacy interests. Pursuant to state law, California treats the criminal history record information consolidated in the state's central repository as available only for criminal justice purposes unless otherwise authorized by statute or court order.

The fact that the information sought is contained in public records somewhere in the nation does not mean that the individual's privacy interests in nondisclosure have been extinguished or even attenuated. This Court recognizes that whether the information sought is a matter of public record some place in the nation is not decisive if determining the existence of a privacy issue in a FOIA case. (See *Dept. of State v. Washington Post Co.*, 456 U.S. 595, pp. 602-603 fn. 5 (1982).)

Rather than fading with time, the privacy interests of the average person with a criminal record grow with the passage of time as memories fade and their criminal history loses any newsworthiness it may have ever had. (See *Briscoe v. Reader's Digest Assoc., Inc.*, 4 Cal.3d 529 (1971); Rest. of Torts, § 867, Com. c.); Wm. Prosser and R. Keeton, *The Law of Torts* (3 Ed. 1984), p. 859).

Respondents' reliance on *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) is misplaced because there the issue was the press' First Amendment right to publish information obtained from public records contemporaneous with criminal proceedings. The issue in this case is whether FBI disclosures of historical information invade a citizen's privacy rights. Whether or not an individual can bring an action against the press for the publication of this criminal history information or against the FBI for disclosing the information is not the appropriate basis for

determining if FBI disclosure of the information constitutes an unwarranted invasion of privacy.

The privacy exemptions of the FOIA embody a congressional determination to prevent the invasion of an individual's privacy by government *disclosure* (not *publica-*
tion by the press) of personal information maintained in government records regardless of whether principles of modern tort and constitutional law allow the individual to maintain an action for invasion of privacy. Indeed, if the individual cannot maintain such an action that is all the more reason for affording him the protection of the privacy exemptions. (See D. O'Brien, *Privacy, Law, and Public Policy*. See also Richard F. Hixon, *Privacy in a Public Society* (New York, Oxford University Press, 1987) at pp. 204, 237.)

The balancing test of the FOIA privacy exemptions is necessary only where there is "substantial uncertainty" whether the invasion of privacy is unwarranted. (AG's 1974 FOIA Amdts. Mem., *supra*, at 520.) Compelled FBI disclosure of criminal offender information clearly invades the individual's privacy right not to have the government disseminate information of criminal activity contained in government compilations.

The type of information involved in this case is so harmful to an individual's privacy interests that there is no uncertainty that such an invasion is "unwarranted." Even if a balancing test were employed, such an invasion of privacy is so contrary to the intent and objectives of the FOIA that there is no conceivable public interest in the disclosure of this information.

IV

FBI DISCLOSURE OF CRIMINAL OFFENDER INFORMATION CONTAINS AN UNWARRANTED RISK OF PLACING A CITIZEN IN A FALSE LIGHT

It is an invasion of a person's privacy to place him in a "false light" by depicting him as a person with a criminal background when in reality he has no such background. (Wm. Prosser and R. Keaton, *The Law of Torts, supra*, p. 864.) Compelling the FBI to respond to a FOIA "name check" request is unwarranted because of the high risk of invading a person's privacy by misidentifying him as someone with a criminal background. Although federal regulations and FBI policies place a great deal of importance on the completeness and accuracy of the criminal history data disseminated by the FBI, studies of criminal history records, even those conducted by the government, have consistently demonstrated a pervasive pattern of data inaccuracy. (Lowenthal, "The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act," Fall 1987, *Jurimetrics Journal* 9, at p. 14.)

The FBI acknowledges that many of its records are neither accurate nor complete. (App., pp. 65, 90.) Before the FBI disseminates identification records requested for nonfederal employment or licensing purposes, it routinely deletes any entry more than one year old without a disposition. (App. p. 66).

Requests made on the basis of "name checks" carry a high risk of an inaccurate response if the subject has a common name. Even if a date of birth is furnished the FBI will not honor the request if there is a danger of a

mistaken response. (App., pp. 65, 67, 90.) Name check requests from law enforcement agencies are honored because these agencies have the resources to resolve the question of identity. (App., p. 67.)

Requiring the FBI to respond to FOIA requests made without the safeguard of fingerprints violates not only the required confidentiality of the FBI's records, and the laws of many states who submit information to the FBI but also the quality control procedures the FBI has instituted to prevent the injustice of mistakenly branding an innocent citizen as someone with a criminal past.

The risk that an innocent citizen could mistakenly be placed in the false light of a criminal past is so unacceptable that it is an unwarranted invasion of privacy to require the FBI to ignore the risk by violating its own carefully designed procedures.

—0—

CONCLUSION

For the foregoing reasons amicus urges this Court to hold that the Freedom of Information Act does not require the FBI to disclose criminal history information because such disclosure constitutes an unwarranted invasion of privacy.

DATED: June 17, 1988

Respectfully submitted,

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JOSEPH E. SPANIOLO, JR.
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IN THE

Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE*
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INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of civil rights and civil liberties. The ACLU has a long history in promoting freedom of information through legislation and litigation. The ACLU also has a strong interest in protecting privacy rights and has testified before Congress concerning the threats posed by the FBI's compilation of name-indexed criminal records.

This case involves a conflict between the right of privacy and the right to open government. As recognized by Congress in the privacy exemptions of the Freedom of Information Act (FOIA), the resolution of that conflict calls for careful balancing. The court below refused to engage in such

balancing. Because we believe that approach was misguided, we respectfully submit this brief as amicus curiae.^{1/}

SUMMARY OF ARGUMENT

The central purpose of the Freedom of Information Act (FOIA)^{2/} is to "ensure an informed citizenry, vital to the functioning of a democratic society . . ." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978); Department of the Air Force v. Rose, 425 U.S. 352, 361 (1976). Agency records must be disclosed unless they come within specific exemptions of the Act that are to

1/ Counsel for petitioners and respondents have consented to the filing of this brief. Their letters have been filed with the Clerk pursuant to Rule 36.2 of the Rules of this Court.

2/ 5 U.S.C. § 552 (1982) as amended by the Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Title I, Subtitle N, Sections 1801-1804, 100 Stat. 3207-48 (1986).

be narrowly construed. United States Department of Justice v. Julian, 56 U.S.L.W. 4403, 4404 (1988). Thus the inquiry is usually whether the requested information is within a category of material that the agency may choose to, but need not, withhold.

The privacy exemptions, 6 and 7(C), are different. They are designed to protect information in the hands of the government, the release of which may invade an individual's privacy. These exemptions pose the classic conflict between the importance of the public's need to know about the workings of government and the world at large in order to be able to govern itself effectively, and an individual's right to be free of unnecessary intrusion into his or her private affairs. In enacting the Freedom of Information Act, Congress

recognized that these two competing rights could only be reconciled by balancing the competing interests involved in each specific case. Only the courts, not the legislature can weigh the balance in each individual circumstance.

The court below acknowledged the balancing requirement in theory but disregarded it in practice. Instead, it initially looked at a single factor--state law on disclosure of criminal history records. When that approach proved unworkable, the court turned to whether the information was a matter of "public record." The Court of Appeals refused to acknowledge the long-recognized privacy interest in criminal history records and the harm which can flow from disclosure of such records, even though they are a matter of public record, or the important public interests

that may be promoted by disclosure of such records.^{3/}

ARGUMENT

I. THE PRIVACY INTEREST ANALYSIS APPLIED BY THE COURT OF APPEALS WAS INCORRECT

The Court of Appeals held that whether there was a privacy interest in criminal history records depended only upon whether the information was a matter of public record. Reporters Committee for Freedom of the Press v. United States Department of Justice, 816 F.2d 730, 740 (D.C. Cir. 1987) [hereinafter Reporters Committee I]; Reporters Committee for Freedom of the Press v. Justice, 831 F.2d 1124, 1127 (D.C. Cir.

^{3/} The American Civil Liberties Union takes no position on whether the individual records at issue in this case should be disclosed. It submits this brief as amicus curiae simply to point out that the Court of Appeals incorrectly interpreted the FOIA in determining this issue.

1987) [hereinafter Reporters Committee II]. Because of this truncated analysis, it failed to properly consider what privacy interests may be harmed by disclosure of the records.

Determining the strength of the privacy interests in criminal history records in a particular case requires consideration of other factors in addition to whether the information was a matter of public record. Such factors include the potential harm caused by disclosure, the accuracy, completeness and age of the record, and the nature of the record itself. For instance, privacy rights in criminal history records may be viewed on a spectrum that accords arrest-only records the greatest confidentiality protection and conviction records a lesser degree of protection.

The court below ignored the long-recognized privacy interest in these records, and limited its inquiry to whether criminal history records are made available in some form, at some time, at the state level. This standard is inappropriate when applied to the wholly different character of federal criminal history records systems.

A. An Individual's Right to Privacy Extends to Criminal History Records Even Though the Information Contained in the Records Was Once Publicly Available.

The elaborate criminal history records system maintained by the FBI, cumulative and name-indexed, is more than just a collection of state criminal history records, which, as original records of entry, are only stored chronologically. The FBI's organization, indexing, and centralization of its records system transforms the raw data received from the state record repositories into a

completely different product. The possible intrusiveness of a search through a computerized, name-indexed database is far greater than that which can result from a search of the original records of entry. The corresponding harm to an individual is therefore greater as well.

State statutes acknowledge that, to protect privacy, differing standards of access are needed for different kinds of record systems. These standards would be eviscerated if record requesters could receive any and all records from the FBI's central repository:

. . . [t]here is a great disparity among present state laws and policies regarding noncriminal justice access and use. Laws and policies on dissemination range from those in a few states that essentially do not permit access to any criminal history records for any noncriminal justice purpose to those of a few 'open records' states that permit access to all or most of such records for anyone for any purpose. Between these extremes is an

almost bewildering variety of statutory approaches^{4/}

All but two states distinguish between original records of entry and cumulative, name-indexed criminal history records, and restrict the public's access to the more sophisticated records system.^{5/} These restrictive dissemination laws reflect the states' recognition that cumulative, name-indexed criminal history records are entitled to a greater degree of protection.

In an earlier FOIA case, the Supreme Court noted that the mere fact that a record, including a past criminal conviction, "is a matter of public record

^{4/} SEARCH Group, Inc., A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of III for Noncriminal Justice Purposes (1984) at 4.

^{5/} The two states that do not make this distinction are Florida and Wisconsin. Fla. Stat. Ann. § 119.07, 943.053; Wis. Stat. Ann. § 19.35.

somewhere in the Nation cannot be decisive" in determining whether the information in the record is private.

Department of State v. Washington Post Co.,
456 U.S. 595, 603 n.5 (1982).

As Judge Starr similarly recognized in his dissent below:

Computerized databanks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves. This conclusion is buttressed by what I now know to be the host of state laws requiring that cumulative, indexed criminal history information be kept confidential, as well as by general Congressional indications of concern about the privacy implications of computerized data banks.

Reporters Committee II, 831 F.2d at 1128.

Judge Starr noted that if the majority opinion is upheld and carried to its logical extreme,

the federal government is thereby transformed in one fell swoop into the clearinghouse for highly personal information, releasing records on any

person, to any requester, for any purpose [T]his new-fangled regime will have a pernicious effect on personal privacy interests in conflict with Congress' express will.

Id. at 1130.

In other contexts, this Court has recognized the enhanced danger to personal privacy posed by computerized databanks containing personal, sensitive information:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized databanks and other massive government files The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.

Whalen v. Roe, 429 U.S. 589, 605 (1977). As Justice Brennan observed, the centralized storage of computerized data "vastly increases the potential for abuse of that information" Id. at 606 (Brennan, J., concurring).

B. Disclosure of Criminal History Records May Result in Serious Harm to Individuals.

1. The criminal history records maintained by the FBI are often incomplete and inaccurate.

The quality of the FBI's criminal history records is poor, exacerbating the intrusion into personal privacy and the stigma resulting from release of these records to the public. Fifty percent of the FBI's criminal history records are incomplete because they lack dispositions^{6/}, and twenty percent contain inaccurate information.^{7/} Allowing public release of stigmatizing information that is unreliable, incomplete,

6/ FBI Oversight and Authorization Request for Fiscal Year 1988: Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 100th Cong., 1st Sess., 184 (1987).

7/ U.S. Congress, Office of Technology Assessment, Alternatives for a National Computerized Criminal History System 91 (1982).

or clearly inaccurate, inflicts substantial and unjust injury on individuals. The potential for harm is staggering given that between one-fourth and one-third of the total work force has a criminal history record.^{8/}

The D.C. Circuit required the FBI to maintain accurate records in Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974), ruling that "dissemination of inaccurate criminal information without the precaution of reasonable efforts to forestall inaccuracy restricts the subject's liberty without any procedural safeguards designed to prevent such inaccuracies." Id. at 1123. The Tarlton court held that the FBI cannot paint itself as just the "passive recipient"

8/ Bureau of Justice Statistics State Criminal Records Repositories 1 (1985); SEARCH Group, Inc., Criminal Justice Information Policy: Privacy and the Private Employer 7 (1981).

of records from state and local agencies.

Id. at 1126.

2. Disclosure of arrest records will have a disproportionate impact on racial minorities

The dissemination of arrest records to the public will perpetuate discrimination against racial minorities in employment and licensing determinations. Blacks are arrested four times more frequently than whites, even though nearly half of those arrests do not end in conviction. In 1980, Blacks accounted for about twenty-nine percent of all records in the FBI's files, nearly triple the percentage of Blacks in this country.^{9/}

^{9/} U.S. Congress, Office of Technology Assessment, Alternatives for a National Computerized Criminal History System 141 (1982). See also, J. Petersilia, Racial Disparities in the Criminal Justice System (1983); Smith, Visher & Davidson, "Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions", 75 J. Crim. L. & Criminology 234-49 (1984).

Courts have recognized the "considerable obstacles which an arrest record poses to an individual's pursuit of happiness and enjoyment of freedom and liberty, and the particularly heavy toll which such records have had on minorities"^{10/} In Gregory v. Litton Systems, 316 F.Supp. 401 (C.D. Cal. 1970), modified on other grounds, and aff'd as modified, 472 F.2d 631 (9th Cir. 1972), a federal district court held that non-conviction data is not relevant to an applicant's employment, finding that a policy of refusing employment to Blacks solely on the basis of arrest records has a racially discriminatory impact because Blacks are "arrested substantially more frequently than whites in proportion to their numbers." Id. at 402-03. See also

^{10/} Utz v. Cullinane, 520 F.2d 467, 491 (D.C. Cir. 1975).

Green v. Missouri Pacific R.R., 523 F.2d 1290 (8th Cir. 1975) (individuals may not be denied employment on the basis of convictions that do not significantly bear upon the particular job requirements).

3. Courts recognize that disclosure of criminal history records may result in serious harm to individuals

A variety of harms to individual privacy may result from disclosure of criminal history record, including the individual's right to be presumed innocent until proven guilty, damage to one's reputation caused by the release of an arrest record, the stigmatizing effect of a criminal history record, and the lack of probative value or relevance of an arrest record.

This Court has acknowledged the tangible harms resulting from the release of criminal history records, particularly records of arrest that do not end in conviction.

Michelson v. United States, 335 U.S. 469 (1948). In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the Court held that one may not be denied admission to the bar based on an arrest record:

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct When formal charges are not filed . . . whatever probative force the arrest may have had is normally dissipated.

Id. at 241.

Even in Paul v. Davis, 424 U.S. 693 (1976), which held that there is no constitutional protection against disclosure of the fact of arrest, the Court recognized the potential harm flowing from disclosure of an arrest record, and the right to recover for such harm in some circumstances. Id. at 701. Justice Brennan cautioned against misinterpreting the majority opinion to undermine the many federal and state

court cases "relying on the privacy notions and presumption of innocence" that place "substantive limits on the power of government to disseminate unresolved arrest records outside the law enforcement system." Id. at 735 n.18 (Brennan, J., dissenting).

Lower courts have recognized that "opportunities for schooling, employment or professional licenses may be restricted or nonexistent..." as a consequence of the dissemination of arrest records. Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970).

See also State v. Pinkney, 33 Ohio Misc. 183, 290 N.E.2d. 923 (1972). In Doe v. Webster, 606 F.2d 1226, 1245 (D.C. Cir. 1979), the D.C. Circuit held that release of a set-aside conviction record would result in "economic, social and legal consequences which impair . . . reintegration into society." Based on this evidence of harm,

the court ruled that the right to privacy encompasses:

a substantial measure of freedom for the individual to choose the extent to which the government could divulge criminal information about him [or her], at least where no conviction has ensued and no countervailing government interest is demonstrated.

Id. at 1238 n.49 (quoting Utz v. Cullinane, 520 F.2d 467, 482 n.41 (D.C. Cir. 1975)).

In Utz v. Cullinane, the same court could not "divine any interest--whether compelling or merely rational--that the government must have in dissemination" of arrest records outside the criminal justice community, finding such dissemination inconsistent with privacy and due process rights:

For the government to disseminate an arrest record pertaining to the allegedly criminal episode, when it knows that employees may infer that the individual was guilty rather than innocent of the crime, effectively permits the government to inflict punishment despite the fact

that guilt was not constitutionally established.

Id. at 481.

Not only has access to criminal history records been restricted, but in some instances, courts have ordered that records be destroyed to protect privacy interests.

Natwig v. Webster, 562 F.Supp. 225 (D.R.I. 1983) (ordering expungement of a fifteen year-old arrest record).

4. Congress and the executive branch recognize that disclosure of criminal history records may result in serious harm to individuals

The FBI maintains a central repository of local, state, and federal criminal history records and provides these records to law enforcement agencies nationwide. In recognition of the substantial harm to privacy interests that can result from disclosure of these records, federal legislation restricts disclosure of criminal

history records maintained by the FBI. Congress authorizes the release of criminal history records to non-law enforcement officials on a limited basis and only where specifically authorized by federal or state statute.^{11/}

Moreover, the Executive Branch has implemented procedures to protect against unsupported inferences by employers based upon incomplete arrest records that may lead to the unfair denial of employment opportunities. Since 1974, the FBI has

^{11/} Congress has authorized the FBI to disclose criminal history records only to certain industries including: portions of the securities industry, Securities Acts Amendments of 1975, 15 U.S.C. § 78q (1982); the commodities industry, Futures Trading Act of 1982, 7 U.S.C. § 21 (1982); the nuclear power industry, Omnibus Diplomatic and Antiterrorism Act of 1986 § 606, 42 U.S.C.A. § 2169 (West Supp. 1987); federally chartered or insured banks, Department of State Appropriations Act, Pub. L. No. 92-544, 86 Stat. 1109 (1973); and state and local government officials where mandated by state statute, id.

operated under a regulation known as the "one-year rule," which prohibits dissemination of arrest records older than one year which lack disposition data even to the limited, authorized non-law enforcement requesters.^{12/} The underlying privacy interests protected by the one-year rule have been explicitly recognized by the FBI.^{13/}

II. THE PUBLIC INTEREST ANALYSIS APPLIED BY THE COURT OF APPEALS WAS ALSO INCORRECT.

The Court of Appeals held that the public interest in disclosure of any and all information sought under the Freedom of Information Act is always the same. Based

^{12/} 28 C.F.R. § 50.12 (1974). See also 28 C.F.R. § 20.33 (1974).

^{13/} See Joint Appendix at 66, affidavit of C. Kenneth Arnold, Section Chief of the Recording and Posting Sections, Identification Division, FBI.

on its desire to avoid the "awkwardness of the federal judiciary appraising the public interest in the release of government records," Reporters Committee I, 816 F.2d at 740-41,^{14/} the majority held that the "public interest" to be considered under Exemptions 6 and 7(C) of the Act "means [nothing] more or less than the general disclosure policies of the statute,"

Reporters Committee II, 831 F.2d at 1126. The court's refusal to consider the public interest in disclosure in relation to the

^{14/} Initially the court held that the public interest in the FBI's disclosure of state records depended upon the originating state's determination of whether such disclosures are in the public interest. 816 F.2d at 741. On rehearing, the court abandoned this approach because the different and conflicting state policies concerning disclosure of arrest records would make it "confusing and indeed unworkable" to use state policies as a benchmark of the public interest in disclosure of the records. Reporters Committee II, 831 F.2d at 1125.

particular information at issue is contrary to both the text of the FOIA and court decisions interpreting the statute. The public interest in disclosure of information, the release of which would contribute to public debate or understanding of an issue of public concern, is much greater than the public interest in disclosure of, for example, the private details concerning individuals which are contained in government records.

By disregarding even the possibility of such distinctions, the court below ignored the unique place that the privacy exemptions hold in the statutory scheme. No other exemptions refer to or call for a balancing of interests after it is determined that the requested information is exempt.^{15/} The

^{15/} In the other exemptions Congress struck the balance against disclosure and the courts' duty is limited to determining

only role assigned to the judiciary under the other exemptions is to determine whether the requested information comes within the exemption. Exemptions 6 and 7(C) call for further judicial inquiry. Under Exemption 6, records can be withheld only if their disclosure "would constitute a clearly unwarranted invasion of personal privacy," and under Exemption 7(C), only to the extent that production of the records "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552 (1982), as amended by Freedom of Information Reform Act of 1986, Pub. L. No. 99-570 § 1801-1804, 100 Stat. 3207-48 (1986). Thus, the statute requires the courts to decide whether disclosure of the

whether the material is within the defined category of exemption. Lesar v. United States Department of Justice, 636 F.2d 472, 486 n.80 (D.C. Cir. 1980).

information constitutes an invasion of privacy and whether such invasion is warranted.

In determining whether the harm to the privacy interests is warranted, the courts must necessarily consider the public interest in disclosure of the particular information requested. The statute directs the courts to engage in a balancing test; it nowhere limits what they should consider in doing so.

In NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) this Court explained that the statutory language requires a determination of whether disclosure of information would constitute "an unwarranted invasion" on a case by case basis. Specifically, Robbins addresses the distinction between exemptions 7(A) and 7(C):

There is a readily apparent difference between subdivision (A) [of Exemption 7] and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases--'a person,' 'an unwarranted invasion,' 'a confidential source'--and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

437 U.S. at 223-24.

The legislative history of the FOIA confirms that Congress expected the courts to evaluate the public interest in the specific information sought. As Congress recognized, the privacy exemptions "involve a balancing of the interests between the protection of an individual's private affairs from unnecessary public scrutiny and the preservation of the public's right to government information." S.Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); see also

H.R. Rep. No. 1497, 89th Cong. 2d Sess. 11
(1966).

The Court of Appeals erred in assuming that because Congress did not set out a standard against which to judge the public interest in disclosure, Congress intended the courts to give "public interest" a static weight in the balancing process. As the Senate Committee Report noted, "[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

The privacy exemptions must also be viewed in light of prior decisions in the area that have been left unchanged by Congress. See Reed v. Steamship Yaka, 373 U.S. 410, 414-15 (1963). For almost two decades, the courts have consistently assessed the public interest value of the

specific information requested in reviewing privacy exemption cases. See, e.g., Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Cochran v. United States, 770 F.2d 949 (11th Cir. 1985); Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984) (Exemption 7(C) balancing test must be applied to the specific facts of each case); Ferri v. Bell, 645 F.2d 1213 (3rd Cir. 1981); Baez v. Department of Justice, 647 F.2d 1328 (D.C. Cir. 1980); Columbia Packing Co., v. USDA, 563 F.2d 495 (1st Cir. 1977). It is significant that this consistent interpretation has not been altered by Congress despite other amendments to the FOIA reversing court decisions.

Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), which analyzed the public interest of the particular information requested, was decided before Congress passed the 1974 FOIA amendments. Following extensive hearings

and a comprehensive committee report, Congress made a number of procedural changes and amended Exemptions 1 and 7^{16/} to reverse judicial interpretations allowing agencies to withhold more information than Congress intended. Freedom of Information Act, Pub. L. 93-502, 88 Stat. 1561 (1974). However, Congress did not instruct the courts to apply a different approach in balancing the public interest in disclosure under the privacy exemptions. See Lesar v. Department of Justice, 636 F.2d 472 (D.C. Cir. 1980).

Although it is possible that Congress was unaware of the courts' application of the public interest standard in 1974, by 1986 the fact-specific approach utilized in Getman was widely employed. See cases cited

^{16/} The 1974 amendments added Exemption 7(C) to make clear that the protections in Exemption 6 also apply to law enforcement records. 120 Cong. Rec. S17033 (daily ed. 1974) (statement of Sen. Hart).

supra 29. Yet, in 1986 Congress again considered various amendments to the FOIA and went so far as to amend Exemption 7(C) without attempting to change the balancing test in privacy cases.^{17/} This is persuasive evidence that Congress agrees with the approach utilized by the appellate courts. See Missouri v. Ross, 299 U.S. 72 (1936); see also Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 488 (1986).

The Court has also approved such an approach. In Department of State v. Washington Post Co., 456 U.S. 595 (1982) (concerning the applicability of Exemption 6 to records pertaining to the citizenship of certain Iranian officials), this Court directed the lower court to look at the

^{17/} Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Title I, Subtitle N, Section 1801-1804, 100 Stat. 3207-48 (1986).

complete factual picture in balancing the competing interests. The Court nowhere indicated that such examination was to be limited to the privacy side of the equation. "The public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a clearly unwarranted invasion of personal privacy . . ." 456 U.S. at 603 n.5 (emphasis added).

The court below ignored both the statute and settled precedent. The cases cited by the court for the proposition that the FOIA generally does not differentiate based on the purposes for which information is requested, do not support its misinterpretation. It is a non sequitur to argue, as the court below does, that the statements in FBI v. Abramson, 456 U.S. 615

(1982) and NLRB v. Sears, 421 U.S. 132 (1975) mean that the public interest to be weighed under exemptions 6 and 7(C) is the same for all information.^{18/}

In addition, the recent decision in United States Department of Justice v. Julian, 56 U.S.L.W. 4403 (1988), calls into question these statements in Abramson and Sears. The Court in Julian held that, under Exemption 5, different classes of requesters may have different rights to disclosure of information. The Court reasoned that simply because the statute refers to the right of "any person" to receive information, it does not mean that under no circumstances does the statute recognize differences based on

^{18/} The statements in Abramson and Sears were not made in the context of addressing the issue of what should be considered in conducting the required balancing test under exemptions 6 and 7(C). Reporters Committee I, 816 F.2d at 746.

the identity of the person seeking disclosure. 56 U.S.L.W. at 4406.

The expressed concern of the court below about the capability of courts to make an individualized determination of the public interest is also contradicted by prior cases. For example, in Department of the Air Force v. Rose, 425 U.S. 352 (1976), the Court considered the application of Exemptions 2 (internal agency rule exemption) and 6 to summaries of disciplinary proceedings against cadets at the Air Force Academy. The Court analyzed both the public interest in disclosure of the summaries and the harm which might flow from their disclosure.^{19/} Although the

^{19/} The Court noted the significant privacy concerns implicated by disclosure of the disciplinary records, although such records typically contain less harmful information than do criminal history records.

Court's weighing of the public interest occurs in the context of its discussion of Exemption 2 rather than Exemption 6, it nowhere limited the applicability of the analysis to Exemption 2. In all events, the case demonstrates that courts can conduct precisely the kind of analysis the court below rejected.

Moreover, the courts have based their analyses on objective considerations. For example, in Department of the Air Force v. Rose, the Court considered the existence of press accounts concerning the matter, the importance of the military and of fair disciplinary proceedings and the relation between the information sought and the stated purpose of the Act to inform the public about governmental action.^{20/}

^{20/} In Stern v. FBI, 737 F.2d 84 (D.C. Cir. 1984), the court considered the level of responsibility held by the federal

In short, the attempt by the court below to avoid an individual determination of the public interest involved in disclosure of particular information ignores the statute and the cases. The lower court attempted to substitute its judgment concerning the role the judiciary should play in enforcing the FOIA for the legislative determination that has already been made.

III. BOTH THE PRIVACY INTEREST AND THE PUBLIC INTEREST IN DISCLOSURE OF CRIMINAL HISTORY RECORDS DEPEND UPON A VARIETY OF FACTORS IN EACH PARTICULAR CASE

Because criminal history records are records of official government actions, there is a public interest in their

employee, as well as the activity for which the employee was censured, in determining the extent of the public interest in the disclosure of the names of FBI agents alleged to be involved in criminal wrongdoing.

disclosure. The extent of the public interest in disclosure of any particular record will depend upon all of the circumstances, just as the degree to which disclosure will invade a privacy interest also varies with the circumstances.

Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, per se rules of nondisclosure based upon the type of document requested, the type of individual involved or the type of activity inquired into, are generally disfavored.

Stern v. FBI, 737 F.2d at 91.

The interests will vary with the type of information requested.^{21/} Generally

^{21/} Although information relating to the core purpose of the Act--the right of persons to know about the functioning of the government--is obviously of great public interest, the public's interest is not limited to disclosure of information directly concerning the functioning of the government. Rather, there is a broader interest in having a well-informed electorate. Ditlow v. Shultz, 517 F.2d 166, 172 (D.C. Cir. 1975).

speaking, there is a greater public interest in disclosure of conviction records than of arrest records. Conviction records are more probative and informative than arrest records, which indicate very little about the person arrested. Conversely, there is a greater privacy interest in arrest records.

Yet, there may be some circumstances in which the public interest warrants disclosure of an individual's arrest record.^{22/}

The degree of the public interest may also depend upon the subject of the request.

^{22/} In Ferri v. Bell, 645 F.2d 1213 (3rd Cir. 1981), the court granted a prisoner access to a prosecution witness' arrest record to show that a criminal charge was dropped against the witness in exchange for his testimony. The prisoner was entitled to a new trial if such information was improperly withheld from him. The Third Circuit held such an invasion of privacy to be warranted given the substantial public interest in ensuring the fair administration of criminal justice.

As Judge Starr pointed out below:

Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest--one that overcomes the substantial privacy interest at stake--in the rap sheet of a public figure or an official holding high government office.

Reporters Committee II, 831 F.2d at 1129.

In addition, the extent of the privacy interest may depend upon whether the information is already widely known. Furthermore, the age of the records may be a factor in determining both the privacy interest and the public interest.^{23/}

Finally, the purpose for which the records

^{23/} Constitutional values and federal and state statutory policies on disclosure or confidentiality are also indications of the public and privacy interests involved. See, e.g., Washington Post Co. v. Department of HHS, 690 F.2d 252, 263, 265 (D.C. Cir. 1982).

are sought may heighten the degree of public interest in disclosure. For example, the public interest in disclosure may be greater where a requester seeks records to examine governmental action than where a requester seeks the same information for purely commercial purposes. See Wine Hobby U.S.A., Inc. v. I.R.S., 502 F.2d 133 (3d Cir. 1974); c.f. Julian, 56 U.S.L.W. at 4406.

CONCLUSION

The requirement in Exemptions 6 and 7(C) of the FOIA to balance the public interest in disclosure against the privacy interest mandates consideration of all factors on an individualized basis. For the reasons stated herein, this Court should vacate the decision below and direct the district court

to apply the balancing test mandated by Exemptions 6 and 7(C) of the FOIA.

Respectfully submitted,

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IN THE
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UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF RETIRED FEDERAL EMPLOYEES
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in applying Exemptions 6 and 7(C) of the Freedom of Information Act, a court must weigh the public interest in disclosure of the information sought in light of the particular purpose for which the requester seeks to utilize the information.

(i)

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**BRIEF AMICUS CURIAE OF THE NATIONAL
ASSOCIATION OF RETIRED FEDERAL EMPLOYEES
IN SUPPORT OF RESPONDENTS**

The National Association of Retired Federal Employees ("NARFE") submits this brief *amicus curiae* to urge that the Court affirm the decision below but reject the analysis employed by that court in ascertaining the extent to which the public interest was furthered by the release of the documents requested.

INTEREST OF NARFE

NARFE is a nonprofit, incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership now exceeding half a million federal

annuitants (retirees and survivors) living throughout the 50 states, Puerto Rico, the Canal Zone, the Republic of the Philippines, and various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

NARFE has concerned itself with issues affecting the aged and aging, and in particular those issues which affect federal annuitants. NARFE's goal is to identify issues of particular importance to federal annuitants, to inform its members, through its Newsletter and the state and local chapter network, of these issues, and to act upon these issues to further the members' common goals. NARFE also assists federal annuitants in obtaining benefits to which they may be entitled under the retirement laws and by interacting with various federal agencies and private entities on such matters as federal annuities and health and life insurance benefits.

The Office of Personnel Management currently has pending in the District of Columbia Circuit its appeal of NARFE's successful Freedom of Information Act suit compelling the release of the names and addresses of recent additions to the federal retirement rolls. *See National Association of Retired Federal Employees v. Horner*, 633 F. Supp. 1241 (D.D.C. 1986). That court has stayed further proceedings pending resolution of *Reporters Committee*. Accordingly, as this Court's decision may have broad and perhaps unanticipated effects on a range of FOIA issues, NARFE has obtained the consent of the parties to participate in this matter as *amicus curiae*.¹

¹ Counsel for the petitioners and respondents have consented to the filing of this brief. Their letters have been filed with the Clerk pursuant to Rule 36.2 of the Rules of this Court.

ARGUMENT

NARFE supports the judgment below and submits that the decision, requiring release of requested "rap sheets," should be affirmed. NARFE's concern here, however, is that the analysis employed by the court of appeals, and in particular its assessment of the "public interest" in release of the requested documents, is faulty. We submit that the "public interest" side of the balancing employed in Exemptions 6 and 7(C)² is not static, but, like the privacy component of the calculus, varies with each particular request. Moreover, NARFE submits that the assessment of the public interest in release of any particular information cannot be made solely upon examination of the information sought, but must instead include consideration of the identity of the requester and the intended purpose to which the information is to be applied. Thus, we reject the government's proffered "core purpose" test as the measure of the public interest as it is both unworkable, and, more significantly, at odds with Congress' intent.

A. The Court of Appeals' Public Interest Analysis Is Flawed

The court of appeals recognized that Exemptions 6 and 7(C) call for a balancing of the public interest in dis-

² 5 U.S.C. § 552(b)(6) and (7)(C). As both Exemptions 6 and 7(C) hinge release of requested documents on the putative presence of an "unwarranted invasion of personal privacy," they have been used interchangeably throughout these proceedings. There are two significant textual differences between these provisions, however, which demonstrate that Congress did not intend their application to be coextensive: Exemption 6 requires the government to show that release of the information *would* create a *clearly unwarranted* invasion of privacy while Exemption 7(C) merely requires a showing that the release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Thus, the government not only has a heightened burden of proof under Exemption 6, but the substantive standard differs as well.

closure against the individual privacy interests at stake. Yet the court refused to assess the degree of public interest in disclosure of the requested information, concluding instead that "the phrase 'public interest' as used in Exemptions 6 and 7(C) of the Act means [nothing] more or less than the general disclosure policies of the Act." *Reporters Committee for Freedom of the Press v. Department of Justice*, 831 F.2d 1124, 1126 (D.C. Cir. 1987). Thus the court held that the public interest side of the balance is static; no matter who the requester may be or what information is sought, the public interest side of the equation is no more than the broad policy of the Act favoring disclosure. This truncated analysis is incorrect.

For the past twenty years courts have recognized that the public interest component of Exemption 6 required an *ad hoc* assessment of the circumstances of the particular case. While the general policy of disclosure that underlies the statute has been taken as a given in each case, it has not been assumed, as the court below believes, that this obviated the need for a particularized public interest analysis. See, e.g., *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454 (D.D.C. 1977), aff'd sub nom. *Disabled Officer's Ass'n v. Brown*, 574 F.2d 636 (1978). This approach is anchored firmly in the expressions of intent that attended Congress' enactment of the statute:

The phrase "clearly unwarranted invasion of privacy" enunciates a policy that will involve a balancing of interests between the protections of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.

S. Rep. No. 813, 89th Cong., 1st Sess. at 9 (1965). As this Court observed in *Department of Air Force v. Rose*, 425 U.S. 352, 373 (1976), Congress intended that a particularized balancing of the "private and public inter-

ests" be undertaken in each case. See also *id.*, at n.9, ("[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either" quoting S. Rep. No. 813 at 3.) Thus, no matter how "awkward" the court may have found assessing the public interest in disclosure, *Reporters Committee*, 816 F.2d at 740, "the federal courts are duty-bound, for better or worse, to perform the task Congress has assigned [them]." *Id.*, at 746 (Starr, J., dissenting).

To be sure, the court of appeals acknowledged that it was required to undertake a balancing of the privacy and public interests at stake, but it felt helpless to individualize the public interest because Congress had not provided it standards by which to make this assessment. Yet courts routinely determine the "public interest" in a broad range of activities, including both the FOIA itself (search and duplication costs waived if in the public interest, 5 U.S.C. § 552(a)(4)(A)(iii); attorney fees available if there is public benefit, 5 U.S.C. § 552(a)(4)(E)), and unrelated areas of law. See, e.g., *Murray v. United States*, 108 S.Ct. 2529 (1988) (balancing the public interest in deterring unlawful police conduct and having juries receive all probative evidence); *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239 (1988) (considering the "public-interest factors of systemic integrity and fairness" in the context of change of venue); *FDIC v. Mallen*, 108 S.Ct. 1780, 1788 (1988) (weighing the public interest in maintaining public confidence in banks against the right to prompt post-deprivation hearing). See also *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (making public interest a criterion for granting a preliminary injunction). The absence of statutory guidance in these matters has not created insurmountable obstacles for the courts in these and a whole range of other cases, and it should not have done so here.

The court of appeals' difficulty in assessing the public interest in disclosure was caused, in large measure, by

its mistaken assumption that it had to make this assessment without taking account of the identity of the requester and its purpose in seeking the information. Thus, believing that "Congress granted the scholar and the scoundrel equal rights of access to agency records," *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986), the court of appeals limited itself to gleaning the public interest from whatever reflections of that interest inhered in the information itself.

Such a myopic approach, however, disables the court from making the very assessment that Congress has mandated. Raw data, absent consideration of how it will be processed, is valueless. The worth of the information—and its value to the public—necessarily turns on how it will be used. The value of the information, i.e., its public interest, is inchoate until its intended use is credibly articulated. Congress could not have intended, as the court of appeals implicitly held, that a requester who intended to use the retrieved documents for kindling would enjoy the same stature as one who intended to "ascertain for itself whether government action is proper." *Washington Post Co. v. Department of Health and Human Services*, 690 F.2d 252, 264 (D.C. Cir. 1982). With the exception of the court below, which eschewed consideration of the public interest, no court has ever decided an Exemption 6 or 7(C) case without at least tacitly considering how the information would be used. See, e.g., *Department of Air Force v. Rose*, 425 U.S. 352 (concern exclusively with the use intended by the requesters). See also Note, "The FOIA—The Parameters of the Exceptions," 62 Geo. L. J. 177, 197-98 (1973) (Exemption 6 is "an exception to the generalized rule that no inquiry should be made into the particular need of the person requesting the information").

To be sure, this Court has held that the FOIA must generally be applied neutral to the identity of the requester and its purpose. Thus, in *NLRB v. Sears, Roe-*

buck & Co., 421 U.S. 132, 149 (1975), this Court held that "the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein." Similarly, in *FBI v. Abramson*, 456 U.S. 615, 631 (1982), the Court held "Congress did not differentiate between the purposes for which information was requested." As a general rule, there can be no quarrel with this. But as the Court recently recognized in *Department of Justice v. Julian*, 108 S.Ct. 1606, 1612 (1988) (an Exemption 5 case), this is only a general rule:

The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reason for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class.

Similarly, this general rule is inapplicable in the context of Exemptions 6 and 7(C). It is axiomatic that in interpreting statutes the specific must take precedence over the general. *Busic v. United States*, 446 U.S. 398 (1980). It is equally self-evident that acts of Congress should not be construed in a way that would impute to Congress an intent to do a useless thing. *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 624 (1988). Yet by equating the public interest of components Exemptions 6 and 7(C) with nothing more than the general policy favoring disclosure, the court below has wholly denuded these exemptions of meaning. Congress has required a particularized assessment of competing interests based on the circumstances extant at a specific time and place. It would not have done so had it intended that those balancing the interests would merely recite that the public has a general interest in disclosure.

That the court of appeals misconstrued Congress' general mandate of identity- and purpose-neutrality as pre-

cluding it from considering these factors in its public interest analysis is also evident from legislative history of proposed (and partially adopted) amendments to Exemptions 6 and 7(C). Specifically, during the 98th and 99th Congresses, bills were introduced seeking to amend the FOIA. After "the most exhaustive examination of the Freedom of Information Act in its history," S. 774 was introduced and referred to the Senate Judiciary Committee. *See S. Rep. No. 221, 98th Cong., 1st Sess.* at 1 (1983). This bill sought to amend Exemption 6 specifically to exempt from disclosure

records of information concerning individuals, including compilations or lists of names and addresses that could be used for solicitation purposes, the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy.

S. Rep. No. 221, supra at 45.²

In its consideration of the amendment to Exemption 6, Congress explicitly endorsed evaluation of the public interest with reference to the intended use of the requests. Specifically, the Judiciary Committee explained the intent of this amendment as follows:

Finally, the amendment makes it clear that lists of names and addresses which "could be used for solicitation purposes" are subject to the exemption, if disclosure could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy. By requiring the courts to balance the interest in disclosure of such lists against the interest in privacy, the Committee recognizes that disclosure may be appropriate in some circumstances. *See Disabled*

² This amendment was not enacted, and neither was an identical bill presented in the 99th Congress. *See S. 150, "The Freedom of Information Reform Act,"* 99th Cong., 1st Sess. (1985). In 1986, however, the amendments to Exemption 7(C) originally proposed in this legislation were finally adopted. *See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570 (1986).*

Officers Association v. Rumsfeld, 428 F. Supp. 454 (D.D.C. 1977) (list of disabled retired military personnel disclosed to nonprofit organization established to assist members in pursuing benefits and advocating their interests nationally).

S. Rep. No. 221, *supra* at 22. Congress was not only aware that the judicial construction of Exemption 6 calls for the particularized inquiry into the intended use of the information, and thus acquiescent in it by virtue of its silence, *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979), but moreover it explicitly endorsed this approach in consideration of an amendment intended to limit the scope of Exemption 6. The court of appeal's decision is not consonant with this legislative history and, for this reason as well, must be rejected.

For these reasons, it is both illogical and at odds with Congress' intent to analyze Exemption 6 and 7(C) claims as the court below has done. It is a given that Congress was animated by a general favoring of disclosure when it enacted the FOIA. And, self-evidently, having acted on that basis, it can be assumed that this general policy is a reflection of the public interest. At the same time, however, Congress plainly contemplated that in those cases where genuine privacy interests were implicated, a more particularized assessment of the public interest would have to be made. While the general interest the public has in disclosure may be static, its impact is to require a "balance tilted emphatically in favor of disclosure" from the outset. *Bast v. Department of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). Beyond this, however, it remains that Congress called for a discrete balancing that takes account of the specific public and privacy interests at stake. The court below rejects this, and in so doing undermines Congress' purpose.

B. The Government's "Core Purpose" Test is Unworkable

Before the decision in *Reporters Committee*, determination of the public interest in disclosure was a straightforward matter. Courts looked to the uses to which the

requested information was intended to be put and determined how the public was benefited by this use of the requested information. See, e.g., *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Minnis v. Department of Agriculture*, 737 F.2d 784 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Wine Hobby USA, Inc. v. Internal Revenue Service*, 502 F.2d 133 (3d Cir. 1974); *Disabled Officer's*, 428 F. Supp. 454 (1972). Thus, in *Disabled Officer's*, the court identified the public interest by analyzing the services the requester provided in light of the manner in which it intended to utilize the information:

Many of [the Association's] services benefit not only the Association's members, but also military personnel and the public in general. For instance, by lobbying and testifying on proposed and pending legislation, the Association provides information to Congress and helps to insure that Congress is apprised of the interests and needs of a significant segment of the public which its actions will affect.

Id., at 458. To be sure, it has not always been easy to identify a consistent thread running through all these decisions, but in each case an analysis of the intended use of the information by the requester and a determination of how the public was benefited thereby was undertaken.

The government argues that the court below was half-right—it was wrong in eschewing a particularized assessment of the public interest, but it was right in holding that the intended use of the information was irrelevant. The government proposes that, instead of analysis of how the public will be benefited by the disclosure, the public interest must be gauged by how nearly the information serves the "core purpose" of the Act. The government's "core purpose" test, however, is fundamentally flawed.

Perhaps the single greatest problem with the government's "core purpose" test is that there can be found no mention of such a test anywhere in the statutory lan-

guage or its reported history. Congress provided nine specific exceptions to the broad mandate for disclosure of government records, and directed that these exemptions be strictly construed. See 5 U.S.C. § 552(c); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973). Yet there is no exception which permits withholding of documents because a request would not further the "core purpose" of the Act. See, e.g., *Ditlow v. Shultz*, 517 F.2d 166, 172 (D.C. Cir. 1975) ("We are doubtful that the public interest considerations can be limited to those at the core of the Act").

Moreover, while the government suggests that the "core purpose" of the Act is to "open agency action to the light of public scrutiny" *Department of Air Force v. Rose*, 425 U.S. at 372, this is not the uniformly recognized "core purpose" of the Act. See, e.g., *id.*, at 360-61 ("Congress therefore structured a revision whose basic purpose reflected 'a general philosophy of full agency disclosure'"); *Soucie v. David*, 448 F.2d 1067, 1080 (D.C. Cir. 1971) ("Congress passed the [FOIA] in response to a persistent problem of legislators and citizens, the problem of obtaining information to evaluate federal programs and formulate wise policies").

Of course, it is somewhat simplistic to suggest that a statute that was ten years in the making had a sole "core purpose," and, indeed, it is easy to identify at least four competing purposes of the Act. See A. Kronman, "The Privacy Exemption to the Freedom of Information Act," 9 J. Legal Studies 727, 733-38 (1980). Significantly, however, the Senate Report states the purpose of the Act by quoting James Madison:

A people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

S. Rep. No. 813, *supra* at 2-3. Thus, if it can fairly be said that there is one "core purpose" of the FOIA, it must be simply to allow the public access to government information.

Judged against the Senate's conception of the "core purpose" of the Act, the government's test is meaningless. Since the purpose of the FOIA was to give the public access to government information, any request, so long as it sought government records, would serve the "core purpose" of the Act. Information which would not serve this core purpose would simply be information the government did not have, or, perhaps, information which for some other reason could be characterized as nongovernmental. No balancing is required, or even possible, in this formulation of the rule.

Even rejecting Congress' concept of what it was doing in enacting the FOIA and instead accepting the government's notion that the sole purpose of the Act was to allow citizens to oversee the inner workings of executive agencies, the use of a "core purpose" test to gauge Exemption 6 cases is still unworkable. The premise of the government's argument is, presumably, that the greater the privacy interest at stake, the more the release of the information must facilitate monitoring of federal activities. The fallacy of this premise is that there is nothing intrinsic in government records themselves (considered apart from the use to which they will be put) which would allow a court to determine to what extent their disclosure will facilitate monitoring of government activities.

Virtually any governmental information could be used to scrutinize some governmental function. For example, a request for release of the names and addresses of former National Security Agency employees could lead to information from which a book about the NSA could be written. Though less directly, a request for release of

names and addresses of all former federal employees could lead to this same objective.

Similarly, a request for names and addresses of all federal annuitants could facilitate the communication of information from a large segment of the population to Congress and thus "insure that Congress is apprised of the interests and needs of a significant segment of the public which its actions will affect." *Disabled Veterans*, 428 F. Supp. at 458. This information could also be used to make an analysis of whether the cost of living adjustments administered by the Office of Personnel Management are adequate (or excessive) because annuitants may live in areas with different inflation rates. Or this information could be used to assess whether the government timely, accurately and efficiently pays annuitants. Indeed, this information could be used to see if the government is using the retirement fund as Congress contemplated or is diverting monies to some unauthorized purpose.

Accordingly, use of a "core purpose" test adds nothing to the calculus of the public interest, although it does place a premium on the ingenuity (or perhaps disingenuousness) with which the parties can characterize the nature of the requested information. To prevail in an Exemption 6 case, the government would have to show that none of the conjectured uses of the information (no matter how unrelated to the actual purpose of the request) would facilitate monitoring of the operation of the government, or, failing that, that the total "core purposefulness" of the request does not outweigh the privacy interest at stake.

This Court should not impute to Congress an intent to ignore reality and to remit disclosure to a process that is based on a "balancing" that weighs in its scales whatever *post hoc* declarations of purpose the parties or the court can contrive. Instead, it is much more congruent

with Congress' purpose to recognize that the *real* interests at stake are those that should be taken into account in deciding whether disclosure is required. The government's core purpose analysis leads to an approach based on fiction and contrivance. It should be rejected.

CONCLUSION

The result the court of appeals reached is correct and should be affirmed. Its public interest analysis, and the government's "core purpose" test, are incorrect, however, and these rationales must be rejected.

Respectfully submitted,

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IN THE

Supreme Court of the United States
OCTOBER TERM, 1988

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Petitioners,

v.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,

Respondents.

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN,
FREEDOM OF INFORMATION CLEARINGHOUSE
AND NATIONAL TREASURY EMPLOYEES UNION

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**IN THE
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**UNITED STATES DEPARTMENT OF JUSTICE, et al.,
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**BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN,
FREEDOM OF INFORMATION CLEARINGHOUSE
AND NATIONAL TREASURY EMPLOYEES UNION**

INTEREST OF THE *AMICI CURIAE*

Public Citizen and the Freedom of Information Clearinghouse are non-profit public interest organizations that promote public access to government information. Having brought hundreds of Freedom of Information Act ("FOIA") cases over the past 15 years, many of which concerned claims arising under the Act's privacy exemptions, Exemptions 6 and 7(C), these *amici* have an interest in ensuring the viability of the congressionally mandated balancing test that controls the public's access to records that implicate privacy interests. The National Treasury Employees Union, a federal sector labor union that is the exclusive bargaining representative for more than 120,000 federal employees, also has litigated numerous FOIA cases under Exemption 6, including several that have been stayed pending resolution of this case, and thus it likewise has

an interest in ensuring that the courts will continue to apply the balancing test consistent with congressional intent.

Although *amici* support the result reached in the court of appeals, their interest in this litigation does not stem from a desire to obtain the particular type of records at issue in this case, but, rather, relates to the test that will determine access to records that implicate privacy interests. *Amici* urge the Court to reject the court of appeals' analysis which runs afoul of the language of Exemptions 6 and 7(C) of the FOIA, as well as two-decades of judicial decisions applying those exemptions. Thus, like petitioners, *amici* ask this Court to clarify that Exemptions 6 and 7(C) require the courts to conduct *de novo* balancing of the privacy and public interests implicated in particular records and that such balancing must include an assessment of the public interest in disclosure of the particular records. In *amici*'s view, however, petitioners have advocated artificial limits on the factors that courts may take into account in applying the balancing test, which would inappropriately result in a denial of access in this case. Moreover, while we agree with the court of appeals and respondents that a remand is proper, our version of what should transpire on remand differs from theirs.¹

STATEMENT OF THE CASE

Amici concurred generally in petitioners' statement of the case, and will highlight below only the facts that go to the heart of the courts' obligation to conduct a balancing test under the privacy exemptions of the Freedom of Information Act ("FOIA").

¹Counsel for petitioners and respondents have consented to the filing of this brief. Their letters have been filed with the Clerk pursuant to Rule 35.2 of the Rules of this Court.

This case concerns two FOIA requests made by representatives of the news media for records of the criminal histories of several members of the Medico family. The requesters made these FOIA requests in order to uncover any illegal dealings between the Medicos and Representative Daniel Flood, who had reportedly been involved in arranging defense contracts involving millions of dollars for a business operated by the Medicos. Joint Appendix ("J.A.") 97, 128-29. Moreover, the Medicos' business had been identified by the Pennsylvania Crime Commission as a business dominated by organized crime. J.A. 97-98, 128-29. As the court of appeals concluded in its initial opinion below, "the requesters' goal in this case, exposing 'the potential abuse of government funds,' is of public interest." 816 F.2d 730, 742 (D.C. Cir. 1987).

As part of its criminal history files, the Justice Department compiles "rap sheets" on individuals consisting of information about arrests, convictions or incarcerations at the federal, state or local level. These composite records are routinely distributed to law enforcement agencies and other authorized recipients for employment and licensing purposes. 28 C.F.R. § 20.33; J.A. 63-65. In addition, the Department will release rap sheets to the subject of the rap sheet. 28 C.F.R. §§16.32 & 20.34. It will also release rap sheets to the press to facilitate the apprehension of wanted persons, because it has determined that such releases are in the public interest. *Id.* § 20.33(a)(4).

In the course of this litigation, the Department made two non-routine disclosures of rap sheet information. First, it released the rap sheets of three of the Medicos who are deceased because, according to the Department, "[a] defendant's privacy interest disappears at his death," J.A. 49, and thus there is "no longer any substantial privacy interest to be protected." Pet. Br. at 6; J.A. 108-17, 120-26. Second,

the Department confirmed that, with respect to Charles Medico, the sole living subject of the requesters' FOIA requests, it has no rap sheet records pertaining to "financial crimes." It made that disclosure because it agreed with the requesters that disclosure of such records "would be in the public interest." J.A. 108 & 110; *accord* J.A. 105, 113, 115, 117, 121.

Aside from these disclosures, the Department has officially refused to confirm or deny whether it has any records on Charles Medico. J.A. 81, 89. However, the court of appeals disclosed that the withheld records contain information about "minor" crimes that occurred more than thirty years ago. 816 F.2d at 738, 741. Indeed, throughout its brief, the Department characterizes this case as one concerning "obscure" criminal history information. Pet. Br. at 18, 20, 22, 24, 31. However, rather than expressly acknowledging that responsive records exist, and providing additional information to enable the requesters to participate in the debate over whether the records must be disclosed, the Department has urged the courts to decide this case based on its *in camera* submission of the withheld records. *Id.* at 50.

The district court granted summary judgment to the Department, primarily on the ground that 28 U.S.C. § 534 is an Exemption 3 statute that precludes disclosure of rap sheets, a holding that the court of appeals reversed and petitioners have not raised before this Court. App. 54a-55a. In addition, the district court concluded that responsive records other than rap sheets, which it called "non-public agency records," were exempt from disclosure under the balancing test of Exemptions 6 and 7(C). App. 56a. The D.C. Circuit reversed in two sets of opinions that call into question the role of the courts in weighing competing interests under the privacy exemptions.

At the outset of its first opinion, the majority, in a decision written by Judge Laurence H. Silberman, entertained the notion that there are no privacy interests in records that have previously been made public. 816 F.2d at 738-39. However, upon review of this Court's opinions in *Department of State v. Washington Post Co.*, 456 U.S. 595 (1982), and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), it concluded that a low-level privacy interest does remain in some matters that are on the public record. *Id.* at 739-40. The court then turned to the privacy exemptions' balancing test, which has traditionally been employed to determine whether an identifiable privacy interest is outweighed by the public interest in disclosure. After remarking on "the awkwardness of the federal judiciary appraising the public interest in the release of government records," *id.* at 740, and calling such determinations "idiosyncratic," *id.* at 741, the court refused to consider the public interest in the records, concluding that "[w]e as judges are unable to distinguish between the public interest in different criminal records based on the specific intent behind the request, or, for that matter, normally, the identity of the subject of the criminal record." *Id.* at 742 (emphasis in original)(footnote omitted). Instead, the court established a bright-line test based on whether state and local governments have made a determination to place information on the public record, and it remanded the case for a determination of whether the requested records are a matter of public record at their source. *Id.* at 740-41.

Judge Kenneth W. Starr filed an opinion concurring in the result but disagreeing with the majority's public interest analysis because it rested solely on whether other political entities have decided to make the information public. In Judge Starr's words, the majority's approach "collapse[d] improperly a Congressionally-mandated balancing process into a single-factor test; in the process of this curious metamorphosis, the

majority has, with all respect, ignored a number of factors that should figure into a proper assessment of the public interest." *Id.* at 743.

In response to the government's petition for rehearing, the majority modified its rationale, and Judge Starr turned his prior concurrence into a dissent. Although the majority now concluded that it would be inappropriate to defer entirely to state and local determinations to make arrest and conviction records a matter of public record, it revised the balancing test drastically from prior cases, based on what it perceived to be the judiciary's inability to carry out the statutory balancing. 831 F.2d 1124, 1125-26 (D.C. Cir. 1987). Thus, the majority concluded that courts are unable to measure the value of information with reference to the purposes of the FOIA, or "a particular requester's purpose in seeking information, or his proposed use," *id.* at 1125-26; as a result, it collapsed the public interest analysis into a static consideration of the "general disclosure policies of the statute." *Id.* at 1126. Under this approach, federal courts are to do no more than "consider whether there is a cognizable privacy interest in the information sought, and then appraise the impairment to that interest that would result from disclosure." *Id.* The court reversed and remanded the case to the district court for an application of this essentially one-sided test. *Id.* at 1127.

Dissenting, Judge Starr criticized the majority's attempt to write the case-by-case public interest determination out of the statute. In contrast to the majority, Judge Starr found that "there is meaning in the public-interest standard; the way in which meaning is imparted to that term will depend on the information that is sought and the circumstances in each case." *Id.* at 1129. Elaborating, Judge Starr indicated that courts should look to the subject matter of the request, the identity and purpose of the requester and any other factors that bear

on the public interest in disclosure. *Id.* at 1128-29; 816 F.2d at 745-46. Without any further discussion of how the balancing test applies to the instant request, Judge Starr then concluded that "the privacy interest here outweighs the limited public interest in Charles Medico," and the district court's judgment should be affirmed. 831 F.2d at 1130.

SUMMARY OF ARGUMENT

In FOIA Exemptions 6 and 7(C), Congress directed the courts to balance the privacy interests at stake against the public interest in disclosure. Nonetheless, the court of appeals refused to apply this balancing test and essentially rewrote the statute to eliminate such balancing, thereby disregarding the Act's mandate.

The court of appeals' majority refused to apply the balancing test because it concluded that it would be inappropriate for the judiciary to make what it characterized as "awkward" and "idiosyncratic" determinations of the public interest. Not only does this conclusion run afoul of the Act's statutory mandate, but it disregards the role of courts in evaluating the public interest in numerous other contexts, such as in determining whether to issue injunctions and in deciding whether to unseal grand jury records. Similarly, courts have evaluated the privacy interests at stake in construing the Fourth Amendment ban on unreasonable searches and seizures and in determining whether a libel plaintiff is a public figure. Moreover, in the FOIA context, courts have, pursuant to congressional direction, decided where the public interest lies under the privacy exemptions and other aspects of the FOIA, such as in awarding attorneys' fees and reviewing agencies' fee waiver determinations. Based on this vast experience in making privacy and public interest determinations, federal courts are well-equipped to balance competing interests pursuant to Congress'

directive in the privacy exemptions. Thus, we agree with the Department that courts cannot simply refuse to conduct the *de novo* balancing test required by Exemptions 6 and 7(C).

More specifically, the court of appeals erred in limiting its balancing to only a select few of the competing interests at stake. The privacy exemptions call for a balancing of *all* the relevant factors under the circumstances, not simply one factor, however important it may be. Thus, in contrast to the position adopted by the court of appeals' majority and advocated by the requesters below, the public availability of records is but one of many significant factors on the privacy side of the balance. On the other side, the public interest in the records cannot be limited to a general interest in disclosure, as suggested by the court of appeals, or to the so-called "core purposes" of the FOIA, as proposed by the Department. Rather, it must encompass a broad enough inquiry to allow consideration of the nature and purpose of the request and the many ways that the public could benefit from disclosure of specific records.

Under the appropriate balancing test, the government has not met its burden of proving that disclosure of the requested records would constitute an unwarranted (or clearly unwarranted) invasion of personal privacy. Therefore, the case should be remanded to the district court to engage in a proper balancing, based on further public submissions by the Department, which are required if it is to meet its burden of proof under the law.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REFUSING TO HEED CONGRESS' DIRECTION THAT COURTS BALANCE PRIVACY INTERESTS AGAINST THE PUBLIC INTEREST IN DISCLOSURE.

The court of appeals refused to apply the balancing test that is required by Exemptions 6 and 7(C) based on two erroneous assumptions: (1) that Congress could not have meant for courts to apply such a test, and (2) that, even if Congress did mean to place this responsibility on the judiciary, the courts are unable to engage in such balancing. Both of these assumptions are entirely unfounded.

It has never before been disputed that Exemptions 6 and 7(C) require the courts to balance the privacy interests at stake against the public interest in disclosure. By their own terms, the privacy exemptions do not forbid all invasions of privacy but only those that are "unwarranted" or, in the case of Exemption 6, "clearly unwarranted." As the House Report makes clear, "[t]he limitation of 'a clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966), in Subcomm. on Administrative Practice & Procedure, Senate Comm. on the Judiciary, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 32 (1974) ("1974 Source Book"). Both the House and Senate Reports explicitly call for a judicial balancing of the competing interests:

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965), 1974 Source Book at 44; S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964), 1974 Source Book at 92.

Congress rejected a rigid privacy exemption because it would not take into account the many factors that need to be considered in determining whether privacy interests outweigh interests in disclosure of particular records. H.R. Rep. No. 1497, at 11, 1974 Source Book at 32. Instead of striking the balance itself, "Congress enunciated a single policy, to be enforced . . . by the courts, 'that will involve a balancing' of the private and public interests." *Department of the Air Force v. Rose*, 425 U.S. 352, 373 (1976). Thus, it "delegate[d] to the courts the task of making the ultimate determination with respect to disclosure on the basis of the criteria that Congress set." 831 F.2d at 1130 (Starr, J., dissenting). In doing so, Congress "concluded that the balancing of private against public interests . . . should limit the scope of the exemption: 'It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" "Department of State v. Washington Post Co.,

456 U.S. 595, 599 (1982), quoting S. Rep. No. 813, at 9. Placement of the burden of proof on the government, along with the requirement that all exemptions be narrowly construed, also provide a check on the privacy exemptions, as does the requirement that the courts conduct the privacy balancing test *de novo*, which ensures "that the ultimate decision as to the propriety of the agency's action is made by the court and prevent[s] it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, at 8, Source Book at 43.

Despite Congress' mandate that courts balance the competing interests *de novo*, Judge Silberman effectively wrote the balancing test out of the statute by pleading judicial incapacity to assess the specific privacy and public interests at stake. Although he conceded that Congress directed courts to engage in such balancing, he concluded in his first opinion that "surely Congress could not have intended federal judges to make such idiosyncratic determinations. Indeed, had Congress done so, the task thus entrusted to the federal judiciary might arguably exceed Article III limitations." 816 F.2d at 741 (citations omitted). In his second opinion, he reiterated that, if Congress meant for courts to make their "own appraisal of the public's need to know particular information[,] . . . such an unbounded delegation would raise serious constitutional problems." 831 F.2d 1125, 1126 (citations omitted). Judge Silberman did not further elaborate on the constitutional concerns that seemingly led him to ignore the balancing test mandated by Congress.

It strains credulity to contend that it is beyond judicial capacity to determine whether privacy interests outweigh the public interest in the disclosure of certain government information. Indeed, courts have been making similar determinations, without apparent difficulty, for years.

Thus, courts often assess the weight of privacy interests in particular information. For example, in defamation and libel cases, courts determine whether particular plaintiffs have diminished expectations of privacy because they hold or seek government positions with responsibilities of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it," *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), or because they are public figures who "have assumed roles of especial prominence in the affairs of society [or] . . . have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Similarly, in deciding whether a search and seizure violates the Fourth Amendment, courts determine whether it offends an individual's expectation of privacy that "society accepts as objectively reasonable," which depends on a judicial assessment of such factors as the extent to which the individual knowingly exposes the object of the search to the public. *California v. Greenwood*, ____ U.S.____, 108 S. Ct. 1625, 1628-29 (1988)(expectation of privacy in trash exposed to public view is unreasonable); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986)(expectation of privacy in backyard unreasonable because observable from airplanes); *see also Nixon v. Administrator of General Services*, 433 U.S. 425 (1977)(in evaluating President Nixon's invasion of privacy challenge to the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note, Court weighed intrusion against public interest in subjecting records to archival screening).

Courts also decide whether the public interest counsels in favor of a particular outcome in numerous contexts. For example, in determining whether to issue an injunction, the courts balance competing interests, including whether such relief is necessary to prevent irreparable harm and whether the public

interest will be served by issuance of an injunction. *Yakus v. United States*, 321 U.S. 414, 440-41 (1944). Similarly, this Court has held that the public right of access to judicial records can be outweighed by privacy and other concerns. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598-99 (1978). Indeed, the Court remarked that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 599. Likewise, in the area of protective orders, this Court has ruled that "the trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). And in deciding whether to unseal grand jury records, courts must "weigh carefully the competing interests in light of the relevant circumstances" in maintaining the secrecy of particular grand jury records and in disclosure of such records. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222-23 (1979). In such cases, less of a showing of a need for disclosure is required where the need for continued grand jury secrecy has diminished due, for example, to the passage of time. *Id.* at 223.

Other provisions of the FOIA also assign courts the express responsibility of making public interest determinations similar to those called for under the privacy exemptions. Thus, in deciding whether to award attorneys' fees to plaintiffs who prevail in FOIA actions, courts are required to determine whether the disclosure of the requested records benefitted the public and whether the requester's interest in the records is news or public-interest oriented rather than personal or commercial. 5 U.S.C. § 552(a)(4)(D); S. Rep. No. 93-854, 93d Cong., 2d Sess. 19-20 (1974), *in* Sub Comm. on Government Operations, Freedom of Information Act & Amendments of 1974, Source Book: Legislative History, Texts, and Other Documents 171-72 (1975) ("1975 Source Book"). Similarly,

courts review fee waiver determinations *de novo* in order to ensure that agencies waive all processing costs where “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government . . .” 5 U.S.C. § 552(a)(4)(A)(iii). Likewise, in evaluating exemption claims under Exemption 2, which allows the government to withhold information “related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2), courts decide whether “the public could not reasonably be expected to have an interest” in the matter, because the exemption does not apply to “matters subject to . . . a genuine and significant public interest.” *Department of the Air Force v. Rose*, 425 U.S. at 369-70; *see also Washington Post Co. v. U.S. Department of Health & Human Services*, 690 F.2d 252, 269 (D.C. Cir. 1982) (impairment of ability to obtain information prong of Exemption 4 requires “balancing of the extent of impairment and the importance of the information against the public interest in disclosure”). As these examples show, Congress has routinely assigned the courts the function of making assessments of both public and privacy interests, and the courts have performed such functions without difficulty.

The court of appeals did not explain how courts can make other privacy and public interest determinations, but somehow can be institutionally incapable or constitutionally barred from applying the balancing test set forth in the FOIA’s privacy exemptions. By throwing up its hands and refusing to engage in what it found to be an “awkward” and “idiosyncratic” balancing test, the court of appeals’ majority, in the words of Judge Starr, simply “went AWOL, as it were, by failing entirely to heed Congress’ directive.” 816 F.2d at 744.

II. THE BALANCING TEST REQUIRES CONSIDERATION OF ALL THE CIRCUMSTANCES OF THE CASE.

Even when the court of appeals purported to apply a balancing test in its opinion on rehearing, it so limited the factors to be taken into account that it essentially wrote the test out of the statute. The majority’s approach, which Judge Starr characterized as “a single-factor test,” 816 F.2d at 743, runs counter to Congress’ intent and two decades of FOIA precedent.

As noted above, Congress rejected a static privacy exemption in favor of judicial balancing of the interests in particular types of records. In discussing this balancing test, Congress distinguished between government information that has a “bearing or effect on the general public,” H.R. Rep. No. 1497, at 8, 1974 Source Book at 29, and personal information which “might harm the individual,” if disclosed. H.R. Rep. No. 1497 at 11; 1974 Source Book at 32. Thus, “[t]he public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public.” H.R. Rep. No. 1497, at 8, 1974 Source Book at 29. Similarly, “it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public.” S. Rep. No. 813, at 7; 1974 Source Book at 42. As these examples show, Congress envisioned some inquiry into the public interest in the subject matter of the request, as well as into the extent to which disclosure will harm the individual.

In shunning case-by-case balancing, the court of appeals’ majority artificially reduced the inquiry to one privacy factor

and refused to consider the public interest side of the balance. Although the Department of Justice purports to endorse a balancing test that is “governed by a sensible evaluation of all relevant circumstances rather than a mechanical application of bright-line rules either favoring or barring disclosure,” Pet. Br. at 30, it also proposes an overly restrictive inquiry into the public interest part of the equation, and overlooks the fact that it bears the burden of proving that privacy interests outweigh the public interests in disclosure. In contrast to both the court of appeals’ and the Department’s approaches, the only reasonable way for the courts to apply the balancing test is to consider *all* the relevant circumstances in any particular case.

On the privacy side, *amici* agree with the Department that courts should not reduce the inquiry to a single factor, such as whether the information is a matter of public record. However, the Department goes too far in downplaying the importance of prior disclosure of information on privacy interests. This factor is certainly significant, though not necessarily dispositive, in determining the extent to which disclosure will harm an individual. As this Court has stated, “the interests in privacy fade when the information involved already appears on the public record.” *Cox Broadcasting v. Cohn, supra*, 420 U.S. at 494-95; accord *Nixon v. Administrator of General Services*, 433 U.S. at 459 (“of course, [President Nixon] cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public’’). Thus, contrary to the Department’s brief, courts cannot simply ignore the degree to which information has been made public in the past. And, contrary to the majority’s approach in its initial opinion, courts cannot determine whether a matter has been publicized to such an extent that privacy interests are seriously eroded solely by looking to laws or official policies that require publication; actual publicity,

regardless of the existence of laws or formal policies, also must be considered.²

Numerous other factors also affect the extent to which disclosure will invade a person’s privacy. For example, privacy interests vary depending on both the type of offense and the passage of time. And privacy interests in conviction records would be far less than such interests in arrests or mere accusations since convictions, by their very nature, are the result of public proceedings with certain standards of proof and due process and are both a matter of public record and more likely to be known in the community. See *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 865 (D.C. Cir. 1981). Moreover, public figures, especially those holding or seeking government office, have a diminished privacy interest in their criminal histories by virtue of their public positions. See *Common Cause v. National Archives & Records Service*, 628 F.2d 179, 184 (D.C. Cir. 1980). In addition, the Department has taken the position in this case that privacy interests in records of deceased individuals are so greatly diminished that disclosure is warranted without any inquiry into the public interest in the records. J.A. 49; Pet. Br. at 6. The extent of a privacy interest may also be a function of whether the records at issue contain erroneous information that is extremely derogatory. Therefore, as this discussion shows, a court cannot make a meaningful determination of the privacy interests in requested records without engaging in a full analysis of the nature of the records.

The same is true with respect to the public interest side of the equation. Although the Department agrees that courts

²In assessing the privacy interest in rap sheets or other records that are compilations of original records, the privacy interests are no greater or lesser in a compilation than they are in the original records. See *FBI v. Abramson*, 456 U.S. 615, 625, 628 (1982).

must consider the public interest in disclosure under the privacy exemptions, it takes an unreasonably narrow view first, of what constitutes the public interest and; second, of the factors that may be considered by the courts in assessing this interest. Moreover, the Department ignores the fact that it bears the burden or proving that the exemption applies.

In assessing whether the public interest would be served through disclosure of specific documents, the Department limits its inquiry to whether the so-called "core purposes of FOIA may be furthered by a given disclosure." Pet. Br. at 16, 45. However, as lower courts have often recognized, disclosure of information under the FOIA will often advance weighty objectives that may not fall within what the Department characterizes as the FOIA's core purposes. Thus, courts have gleaned policies from other statutes that counsel in favor of disclosure. For example, courts have often ordered the disclosure of employees' names and addresses to union bargaining representatives, not because it assists in understanding government activities -- the Department's characterization of the FOIA's "core purpose" — but because disclosure enhances effective union representation, one of the policies promoted by Congress in the federal labor relations laws. See, e.g., *United States Department of the Navy v. Federal Labor Relations Authority*, 840 F.2d 1131, 1136 (3d Cir. 1988); *United States Department of Agriculture v. Federal Labor Relations Authority*, 836 F.2d 1139, 1143 (8th Cir. 1988); *American Federation of Government Employees, Local 1760 v. Federal Labor Relations Authority*, 786 F.2d 554, 557 (2d Cir. 1986).

Similarly, there is a clear public interest in disclosure of government records concerning the harmful effects of third parties' activities on the environment, even where they do not specifically inform the public about government activities. Likewise, the vindication of constitutional rights that do not

implicate the FOIA's principal objectives can outweigh privacy interests. For example, in *Ferri v. Bell*, 645 F.2d 1213 (3d Cir. 1981), the requester sought disclosure of a third party's rap sheet in order to prove that criminal charges were dropped against the subject of the rap sheet in return for her testimony against him. The Third Circuit found a public interest in disclosure because the information might entitle Ferri to a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963), which requires the prosecution to inform a defendant of information that creates a reasonable doubt as to his guilt. 645 F.2d at 1218.

Therefore, there is simply no reason to limit the public interest inquiry to what the Department regards as the "core purposes" of the FOIA. Just as the courts should engage in a full inquiry into the privacy interests that are implicated in particular records, so too should they fully explore the entire range of public benefits that may flow from disclosure.

Obviously, the subject matter of the request is critical to a determination of whether disclosure will be in the public interest. As Judge Starr pointed out:

Where what is at stake is the disclosure of personal information about a particular subject, one helpful vantage point is the public interest in the subject of the information request. Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant interest — one that overcomes the privacy interests at stake — in the rap sheet of a public figure or an official holding high government office.

831 F.2d at 1129 (citations omitted). Or, as Judge Starr stated in his original concurrence, "[i]n the circumstances of this case,

for example, it seems powerfully relevant that the offenses reflected on the requested records are minor and occurred a long time ago. A traffic ticket, let us say, scarcely partakes of the nature of an arrest, hypothetically, for murder." 816 F.2d at 745. Similarly, courts should consider the identity and purpose of the requester, which Judge Starr concluded would counsel in favor of disclosure in this case, since "the records are sought by representatives of the media for the avowed purpose of exposing the possible misuse of government funds — rather than by some idiosyncratic individual seeking to satisfy a mere curiosity about criminal records . . ." 816 F.2d at 745.

The court of appeals' majority, in a portion of its decision that is endorsed by the Department, Pet. Br. at 47-48 n.35, concluded that courts cannot inquire into the identity or purpose of the requester because the FOIA requires agencies to make records available "to any person," 5 U.S.C. § 552 (a)(3). However, the "any person" proviso merely eradicates the previous law which allowed access only to individuals who could demonstrate a special interest in the records. S. Rep. No. 813, at 5-6, 1974 Source Book at 40-41; 816 F.2d at 745-46 (Starr, J., concurring). Moreover, in its opinions, the court of appeals' majority relied on *Durns v. Bureau of Prisons*, 804 F.2d 701 (D.C. Cir. 1986), cert. granted & op. vacated, 56 U.S.L.W. 3817 (May 31, 1988), for the propositions that "information disclosed to anyone must be disclosed to everyone," 831 F.2d at 1126, and that "Congress granted the scholar and the scoundrel equal rights of access to agency records." 816 F.2d 742, quoting *Durns*, 804 F.2d at 706. However, in *United States Department of Justice v. Julian*, ___ U.S. ___, 108 S. Ct. 1606 (1988), this Court rejected both the result and rationale in *Durns*.

In *Durns*, the D.C. Circuit, in a 2-1 decision written by Judge Silberman, held that prisoners could not obtain access to their

presentence reports because the reports would be privileged when sought by third parties in discovery. The court based this holding on the principle that courts cannot distinguish among requesters under the FOIA. *Durns*, 804 F.2d at 706. Before this Court in *Julian*, the government made the same argument that Exemption 5 could not be construed "in such a way as to make an agency's duty to disclose a presentence report turn on the nature or identity of the requester." 108 S. Ct. at 1614. The Court specifically rejected the contention that "a privilege against disclosure must nonetheless be extended to all requests for these reports, or to none at all." *Id.* Elaborating, the Court made clear:

The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating a claim of privilege under Exemption 5 differently as to one class of those who make requests than as to another class. In this case, it seems clear that there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report. As we noted above, there simply is *no* privilege preventing disclosure in the latter situation.

Id. (emphasis in original).

Congress endorsed a similar approach in the privacy exemptions by mandating a balancing of competing interests to determine whether information is exempt from disclosure. As articulated in the conference report accompanying the 1974 FOIA amendments, "disclosure of information about a person *to that person* does not constitute an invasion of his privacy," and thus the privacy exemptions cannot be used to deprive individuals of personal information about themselves. H. Conf.

Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974); 1975 Source Book at 230 (emphasis added). Indeed, even the Department of Justice recognizes the common sense proposition that the identity of the requester has a sizable bearing on the outcome of the privacy balancing test since its own rules permit the disclosure of rap sheet information to the subject of the information. 28 C.F.R. § 16.32. It is likewise obvious that the identity of the requester can directly impinge on the public interest side of the equation.

After *Julian*, there can be no doubt that the identity and purpose of a requester may affect whether a particular document falls within an FOIA exemption. This approach makes eminent sense in the context of the privacy exemptions since the requester's identity and purpose are factors that can affect the extent to which there is a public interest in disclosure or a potential invasion of privacy.

III. PETITIONERS HAVE NOT MET THEIR BURDEN OF PROVING THAT DISCLOSURE IS LIKELY TO CAUSE AN UNWARRANTED INVASION OF PRIVACY.

In this case, the government did not meet its burden of proving that disclosure of the requested records is likely to cause an invasion of personal privacy. Indeed, instead of putting sufficient information on the record to meet its burden, the Department simply refused to confirm or deny the existence of responsive records. In the circumstances of this case, that approach is wholly unwarranted.

While there may be some situations in which the mere confirmation that responsive records exist will constitute an unwarranted invasion of personal privacy, the government bears the burden of proving that claim, as it does all other claims under the FOIA. See, e.g., *Phillippi v. CIA*, 546 F.2d 1009,

1012-13 (D.C. Cir. 1976). Moreover, the same privacy balancing test controls whether the government should be permitted to refuse to confirm the existence of responsive records. Thus, for example, privacy interests would be minimal if the subject of the record is a notorious criminal, such as Al Capone, or even William Medico, a subject of the original request in this case, whom the 1970 Pennsylvania Crime Commission had publicly confirmed had arrests and convictions on his record. J.A. 38, 97.³

In this case, the government has done no more than assert that disclosing even the existence of a rap sheet for an individual will inevitably constitute an invasion of privacy despite the fact that the only entries may be for offenses as minor as traffic infractions that occurred a long time ago. J.A. 81, 89; 816 F.2d at 745 (Starr, J., concurring). Indeed, one of the records released by the Department reflected that Phillip Medico was arrested on September 2, 1930, for violation of an unidentified city ordinance for which he was fined \$100. J.A. 118-19, 122-23. The disclosure of such information would hardly lead to the adverse consequences postulated by the Department. Therefore, a mere confirmation that there is a rap sheet on Charles Medico, which might contain only such trivial information, would hardly constitute a substantial invasion of his privacy.

The Department's steadfast refusal to confirm the existence of such a record has led to an absurd situation in this case. The court of appeals' majority explicitly confirmed that there

³While it is generally true, as the Department asserts, that "[u]nless disclosure of [rap sheets] is required by FOIA, it is prohibited by the Privacy Act," Pet. Br. at 38, that is so because information must be disclosed under the FOIA unless the government meets its burden of demonstrating that it is exempt. Thus, the Privacy Act acts as a bar to disclosure only if the government has already met its burden, which may entail ascertaining the extent to which records have previously been made public.

are responsive records and that they concern minor offenses that occurred a long time ago, apparently concluding that such a revelation would not cause the harm that the privacy exemptions guard against. 816 F.2d at 738, 741, 744. Rather than litigate this case based on the court of appeals' disclosure, however, the Department continues to maintain that it cannot disclose whether any responsive records exist. Indeed, the Solicitor General has even gone so far as to "withdraw" his prior public representation that any responsive records "would be contained in an FBI 'rap sheet' . . . and would pertain to minor offenses that occurred more than thirty years ago." Letter to Honorable Joseph F. Spaniol, Clerk, Supreme Court of the United States, from Charles Fried, Solicitor General (January 14, 1988); Application for an Extension of Time (January 11, 1988).

As a result of the Department's insistence that it still cannot acknowledge that responsive records, in fact, exist, this litigation has proceeded without full adversarial testing of the government's claims. Thus, the Department has made an *in camera* submission without first placing on the public record information that could shed light on the proper application of the privacy balancing test, yet would not cause the harm that the exemptions protect against. Certainly, for instance, the government could provide the age of rap sheet entries, state whether they pertain to arrests or convictions, and provide a general description of the subject matter of any alleged offenses. Hence, there would be less public interest in minor traffic crimes than there would be in crimes disclosing any organized crime connections or relating to ex-Congressman Flood.

Finally, the lower court should not be permitted, as the Department urges, Pet. Br. at 50, to uphold the agency's exemption claim based on an *in camera* review of the withheld

records, without stating any reasons on the public record. By refusing to confirm that records exist or to place sufficient information on the public record to allow an independent assessment of whether the records are exempt, the government has thus far failed to meet its burden of proof under the FOIA and has turned *de novo* review into "meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, at 8, 1974 Source Book at 43.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed and the case remanded to the district court to apply the privacy exemption balancing test in light of all the relevant circumstances and based on the public record, unless the government makes a showing that placing such information on the public record will cause the harm that the exemptions are designed to guard against.

Respectfully submitted,

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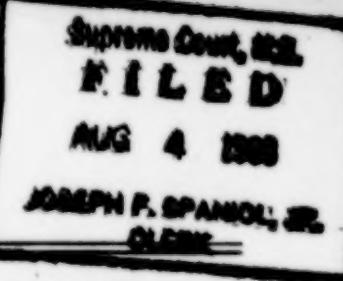
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August 1988

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No. 87-1379



**In the Supreme Court of the United States
OCTOBER TERM, 1987**

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
Petitioners,

vs.

REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE
**THE AMERICAN NEWSPAPER PUBLISHERS AS-
SOCIATION, THE AMERICAN SOCIETY OF NEWS-
PAPER EDITORS, NATIONAL ASSOCIATION OF
BROADCASTERS, THE MIAMI HERALD PUBLISH-
ING COMPANY, THE WASHINGTON POST AND
McCLATCHY NEWSPAPERS, INC.**

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McCLATCHY NEWSPAPERS, INC.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae The American Newspaper Publishers Association, The American Society of Newspaper Editors,

National Association of Broadcasters, The Miami Herald Publishing Company, The Washington Post and McClatchy Newspapers, Inc. (the "amici") file this brief in support of Respondents Reporters Committee for Freedom of the Press and Robert Schakne. Petitioners and Respondents have each consented to the filing of this brief. Their written consents are on file with the Clerk of this Court.

The *amici* represent news reporters, editors, publishers and broadcasters.¹ The *amici* have a direct interest in the outcome of this appeal, which will determine whether they have access under the Freedom of Information Act (FOIA) to public record criminal history information compiled and maintained by the Federal Bureau of Investigation. Such access is important to the *amici*, since they frequently utilize FOIA to report news concerning governmental activities, and they routinely rely upon public records of arrests, indictments, convictions,

1. The American Newspaper Publishers Association is a non-profit corporation whose membership consists of about 1,400 newspapers constituting over ninety percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. The American Society of Newspaper Editors is a nationwide professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The National Association of Broadcasters is a non-profit incorporated association of radio and television broadcast stations and networks, including more than 5,000 radio stations, 900 television stations, and the major commercial broadcast networks. The Miami Herald Publishing Company is a division of Knight-Ridder, Inc. a Florida corporation, and publishes *The Miami Herald*, a daily newspaper in Miami, Florida, which is distributed throughout the State of Florida. The Washington Post, a division of the Washington Post Co., publishes a daily newspaper of general circulation in the Washington, D.C. area (circulation approximately 800,000 on weekdays, 1,000,000 on Sundays) and maintains a substantial newsgathering organization. McClatchy Newspapers, Inc. owns and operates twelve newspapers in California, Washington, and Alaska with an aggregate circulation of approximately 700,000.

acquittals and sentences to accurately report and edit news concerning organized crime, career criminals, public officials, and the operations of the Department of Justice, the Federal Bureau of Investigation, and other law enforcement agencies. A ruling granting access would markedly facilitate the traditional role the *amici* play in monitoring government and the activities of organized crime.

STATEMENT OF THE CASE

The *amici* adopt the Statement of the Case set forth by Respondents in their Brief.

SUMMARY OF ARGUMENT

The court below held that the compiled public record criminal history information of reputed organized crime figure Charles Medico was not exempt from disclosure under the Freedom of Information Act ("FOIA") because the disclosure of such information would not result in an "unwarranted invasion of personal privacy." The government argues that this holding is incorrect, implausibly asserting that a public agency's compilation of public record information regarding matters of legitimate public concern somehow creates a substantial privacy interest which outweighs the public interest in access under the FOIA.

The government's contention must be rejected and the decision of the court of appeals affirmed. Records of the criminal justice system—arrests, indictments, convictions,

acquittals and sentences—Inherently involve matters of legitimate public concern. Consequently, this Court has recognized the constitutional right of the public to monitor criminal proceedings and to inspect criminal records, as well as the central role of the press in informing the public about the criminal justice system. *Press-Enterprise Co. v. Superior Court*, 106 S.Ct. 2735 (1986); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

In addition, the specific information requested in this case is limited to matters of public record. Accordingly, to the extent any interest in privacy in such information might ever have existed, it would have substantially "faded" as a matter of law. No individual has any legitimate expectation that public records of official actions of the criminal justice system will be treated as "private."

Faced with the fact that the requested information is both a matter of legitimate public concern and contained in pre-existing public records, the government's strategy is to define privacy so broadly as to include any and all information relating to an individual. The government's definition of privacy as "control over information about oneself" proves too much and must be rejected as radically overbroad. This Court has recognized, as has the Solicitor General in his prior academic writings, privacy extends to control over certain *intimate personal information* relating to one's private affairs. *Whalen v. Roe*, 429 U.S. 589 (1977). It does not encompass control over *all* information, regardless of its character. Records of arrests, indictments, convictions, acquittals and sentences simply are not information concerning those intimate aspects of one's private life that give rise to a cognizable privacy interest. *Paul v. Davis*, 424 U.S. 693 (1976). But even

were the government correct in defining privacy so broadly, its argument would fail. Since the information here is compiled from admitted public records, there can be no claim to any personal right to "control" or to "disclose" it.

This case thus reduces to the government's naked assertion that the mere collection and compilation of non-private information by a public agency renders such information "private." The gravamen of a privacy claim is the wrongful public disclosure of private facts, but the government's objections to access to the information at issue actually relate to inaccurate collection and possible subsequent misuse. Thus, although the government's purported concern for the potential misuse of compiled information is admirable, it demonstrates privacy is not an issue here. The potential for misuse of collected public record information by a powerful public agency like the FBI does not create a privacy interest; it suggests the need for proper user safeguards, and public access to "watchdog" the implementation of those measures. Thus the act of governmental compilation of public records triggers an even greater interest in access: access enables citizens to determine whether and how government is using its authority to compile these records.

Finally, the court below properly held that the public interest in disclosure outweighed the *de minimis* privacy interest in the information requested here. Reports of governmental waste and corruption lie near the core of the First Amendment. Oftentimes, as in this case, disclosure of criminal history information greatly facilitates such reports.

The decision of the court of appeals should be affirmed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT COMPILED PUBLIC RECORD CRIMINAL HISTORY INFORMATION IS NOT EXEMPT FROM THE FREEDOM OF INFORMATION ACT

Under Exemptions 6 and 7(c) of the Freedom of Information Act, records are exempt from disclosure when the personal interest in the privacy of the information they contain outweighs the public interest in their disclosure. The court below properly held that Charles Medico's privacy interest in his public record criminal history information did not outweigh the public interest in its dissemination through the FOIA. Accordingly, the decision of the court of appeals should be affirmed.

I. THE COMPILATION OF PUBLIC RECORD CRIMINAL HISTORY INFORMATION DOES NOT GIVE RISE TO A SUBSTANTIAL INTEREST IN PRIVACY

The court below correctly determined that Charles Medico had at most a minimal privacy interest in the information requested by the Reporters Committee. First, criminal history information in general is of legitimate public concern and the proper subject of press inquiry. Second, the information requested was limited to public record criminal history information in which any cognizable interest in privacy would be substantially reduced. Third, criminal history information is not of an intimate nature and therefore does not give rise to a protectable privacy interest, regardless of the form in which such information is maintained. Contrary to the government's contention, the compilation by a public agency of public records concerning matters of legitimate public concern

enhances the need for public access to such information; it does not create a new privacy interest. Likewise, access to this information is unrelated to employment discrimination. The objections of the government and the American Civil Liberties Union are directed to the misuse of compiled information, not its disclosure, and are therefore inapposite here. Finally, the government's suggestion that the content of the specific criminal history information requested should determine the weight of the privacy interest in the information must be rejected. Such an approach could be construed to repose virtually standardless discretion in the agency.

A. PUBLIC RECORD CRIMINAL HISTORY INFORMATION IS OF LEGITIMATE PUBLIC CONCERN AND A PARTICULARLY APPROPRIATE SUBJECT OF PRESS REPORTING

This Court has frequently noted the structural importance of public access to information concerning the operation of our system of criminal justice, and the special role the press plays in effectuating the right. *Press-Enterprise Co. v. Superior Court*, 106 S.Ct. 2735 (1986); ("Press-Enterprise II"); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-Enterprise I"); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 594 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Specifically, the Court has held that "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975).

This fundamental right of access serves interests of profound importance: public scrutiny "enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole." *Globe*, 457 U.S. at 606. Access fosters "an appearance of fairness, thereby heightening public respect for the judicial process" and "permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Id.* (footnote omitted).

The special role of the press in this constitutional scheme rests at least in part on the realities of the evolving complexity of our society. "Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claims of functioning as surrogates for the public." *Richmond Newspapers*, 448 U.S. at 572-73. "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations." *Cox*, 420 U.S. at 491-92 (emphasis added).²

2. Although this Court's decisions addressing the qualified First Amendment right of access have generally addressed proceedings, the right has likewise been extended to records both by this Court and the lower federal courts. *Press-Enterprise II*, 106 S.Ct. 2735 (1986) (transcript of preliminary hearing); *Press-Enterprise I*, 464 U.S. 501 (1984) (transcript of voir dire); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (transcript of hearing); *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983) (pre-trial documents).

The information at issue in this case is compiled from records that are "the basic data" of the criminal justice system: arrests, indictments, convictions, acquittals and sentences. Thus, their availability through the FOIA would greatly aid the press in the performance of its special constitutional role of reporting such matters to the public. There can be, and is, no dispute that the records requested are of public actions taken by public agencies about which the public has a right to know.

B. THE CRIMINAL HISTORY INFORMATION REQUESTED HERE IS STRICTLY LIMITED TO MATTERS OF PUBLIC RECORD

The public interest in access to records relating to the actions of criminal justice agencies is reflected in the laws of the fifty states. Records of arrests, indictments, convictions, acquittals and sentences are public in every jurisdiction.³ See Search Group, Inc., *Privacy and Security of Criminal History Information: Privacy and the Media*, Bureau of Justice Statistics 17 (1979). All of the parties to this action admit the particular

3. The states accord compilations of criminal history information maintained by their own law enforcement agencies varying degrees of confidentiality. Some states grant broad public access to the records, some limit their use to criminal justice purposes, some explicitly permit the news media access and others allow dissemination to potential employers. In large part, the states appear to be motivated not by any concern for individual privacy but by the desire to limit dissemination of inaccurate information and to protect against the possible misuse of such information by those permitted access to it.

Most of these restrictions were enacted in response to federal regulations issued by the Department of Justice governing confidentiality and use limitations at the state level. See Brief of Amici Curiae Search Group, Inc., et al., with respect to petition for rehearing *en banc*, at 12. For the government to now claim that federal criminal history compilations must be "private," because some of their state counterparts are, is pure "bootstrapping." The argument must be rejected.

information requested in this case is a matter of public record.

This Court has observed that "even the prevailing law of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public records." *Cox*, 420 U.S. at 494-95.⁴ This Court has held the public's entitlement to inspect public records itself entails the right of the press to gather and report the information in them: "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Id.* at 495. Thus, irrespective of the content of the records requested, they present no cognizable privacy interest because that content is already a matter of public record.

C. COMPILED PUBLIC RECORD CRIMINAL HISTORY INFORMATION IS NOT "PRIVATE" AND ITS DISCLOSURE DOES NOT IMPLICATE PRIVACY RIGHTS

The burden the government must shoulder is the Orwellian task of demonstrating that the dissemination of public records concerning matters of public concern

4. The common law clearly recognizes that once information is a matter of public record, it can no longer be private. See, B. Sanford, *Libel and Privacy*, §11.3.2 (1985) (citing cases). The Restatement (Second) of Torts is in accord: "Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record." *Id.* at §652D, Comment b.

compiled by a public agency constitutes an unwarranted invasion of privacy. That the arguments for such an implausible claim are deeply flawed is shown in what follows.

1. Because The Information Requested Does Not Involve Intimate Aspects Of An Individual's Private Life, No Privacy Interests Are Implicated By Its Dissemination

This Court has considered the right to privacy in numerous contexts, but the ground common to all such cases is that privacy involves the most intimate and fundamental personal aspects of one's life, "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). Thus, this Court has quoted Professor Philip Kurland with approval: privacy includes "the right of the individual not to have his private affairs made public by the government." *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

Similarly, the common law defines the corollary tort of invasion of privacy in relevant part as giving "publicity to a matter concerning the private life of another." Restatement (Second) of Torts, §652D. The Solicitor General has likewise recognized in his academic writings that the right of privacy is implicated only by the most intimate relationships of an individual's private life: "It is my thesis that privacy is . . . necessarily related to ends and relations of the most fundamental sort: respect, love, friendship, and trust." C. Fried, *An Anatomy of Values* 140 (1970); accord Fried, *Privacy*, 77 Yale L.J. 475, 477 (1968).

The information requested here derives from public records of official actions taken by the criminal justice

system. The information does not involve any intimate aspect of an individual's private life. As such, the information simply does not provide a predicate for any claim of an unwarranted invasion of privacy.

2. The Government's Definition Of Privacy Is A Radical Departure From Law And Has Been Repudiated By The Solicitor General In The Past

Faced with the obviously troublesome facts that the records requested do not involve intimate aspects of the private life of any person and do consist of public records of public actions which are of legitimate public concern, the government is forced to adopt a redefinition of "privacy" which is a radical departure from, and broadening of, the traditional legal and common understanding of the term.

According to the government, privacy is "the individual's right to control dissemination of information about himself." Br. 20. Crucial to this definition is the absence of any refinement or limitation of the nature of the information to be controlled. In short, there is no requirement in the definition that the information be in some sense "private" for there to be an invasion of privacy in its dissemination. Based largely on this overbroad definition, the government argues that the disclosure of compiled criminal justice information which is otherwise a matter of public record constitutes an invasion of privacy because it violates the individual's right to control the dissemination of any information relating in any way to himself.

This definition of privacy, and consequently the government's claim that the fact of compilation somehow gives

rise to a privacy interest in public record criminal history information, must be rejected. Indeed, the Solicitor General has himself, writing in another forum, explicitly rejected the definition of privacy espoused by the government here. In response to criticism of the definition of privacy as control over information about oneself, then Professor Fried wrote:

The particular point which [Professor Richard] Posner denies and which I on an earlier occasion had asserted is that privacy is to be defined as the control of information about oneself. Posner's analysis demolishes the notion that there is any such general right or that it would make much sense to recognize one.

Fried, *Privacy: Economics and Ethics, A Comment on Posner*, 12 Ga. L. Rev. 423, 423-24 (1978). In the article Professor Fried admits that the argument that individuals possess a right to privacy defined as the right to control information "won't go through." *Id.* at 427. The disclosure of information about an individual violates his right of privacy only if it violates some underlying substantive right. The disclosure of information standing alone does not violate any right to privacy:

[I]f such information is obtained without violating some other right, I have not been wronged, showing in fact that the basis of right resides not in the information but in those other domains.

Id.

This argument reveals the fundamental flaw in the government's position here. There is no underlying substantive right to limit dissemination of public record criminal history information. The fact of an arrest, convic-

tion, or sentence is not an intimate private fact the disclosure of which would violate some underlying fundamental right. It is a matter of public record reflecting official actions taken with respect to the individual by the criminal justice system.

In the article which elicited the Solicitor General's abandonment of the concept of privacy he advocates here, Judge Posner rejects any privacy interest in criminal history information. Compare Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393 (1978) with Fried, *supra*. Judge Posner trenchantly observes: "Much of the demand for privacy, however, concerns discreditable information, often information concerning past or present criminal activity.

... And often the motive for concealment is, as suggested earlier, to mislead those with whom he transacts. ... It is not clear why society should assign the property right in such information to the individual to whom it pertains; and the common law, as we shall see, generally does not." Posner, *supra*, at 399. Judge Posner states bluntly, "we have no right, by controlling the information that is known about us to manipulate the opinions that other people hold of us." *Id.* at 408.

The assertion of a privacy interest in public record criminal history information is not merely contrary to the dignity inherent in a right-holder's genuine privacy claims, it also denigrates the integrity of those individuals in society who would otherwise have access to such records. In rejecting the claim that "privacy" interests entail a right to conceal criminal history information in order to secure a "fresh start" for the rehabilitated, Judge Posner notes the idea "rests on the popular though implausible and, to my knowledge at least, unsubstantiated assumption that people do not evaluate past criminal acts [or allegations of them] rationally, for only if they intentionally

refused to accept evidence of rehabilitation could one argue that society had unfairly denied the former miscreant a fresh start." *Id.* at 409. As the court below noted, where a conviction or arrest is old and for a minor offense, the "privacy" interest in its nondisclosure is "inappreciable" because its significance to the assessment of the individual is minimal. 816 F.2d at 741 n.14.

Thus, the government's putative privacy right cannibalizes the very interests it seeks to serve. Rather than respecting individual dignity, it denies it. Rather than protecting a fundamental interest, it seeks only to help the individual to evade accountability and to mislead his fellows.

Even were the government's definition of privacy correct, it would fail to apply to the requested information because it is found in public records. The individual, by definition, has no right to control the disclosure of public record information. This information has already been disclosed, and its further dissemination is beyond any individual's control. What the government seeks to control here is not the disclosure of private information, but the very different power to control access to a particular source of compiled public criminal history information. That the compilation and use of such public records by a public agency does not give rise to a privacy claim is shown next.

3. The FBI's Compilation And Use Of Public Record Criminal History Information Gives Rise To An Interest In Access, Not A Right Of Privacy

The mere fact that public criminal history records have been aggregated and computerized does not change

the public character of the information compiled. Certainly Congress has yet to enact legislation to that effect. Nor does the simple act of compilation implicate the putative privacy right to "control information about oneself." This Court's FOIA decisions support this conclusion. Thus, in *FBI v. Abramson*, 456 U.S. 615 (1982), this Court held that it was error to treat "the originally compiled record and the derivative summary . . . completely differently [where] the content of the information is the same." *Id.* at 625. The Court concluded that if the information was exempt from disclosure in the first instance, it must likewise be so in the second. The same rule applies here. Where the basic information is public, no change in the form of the information will suffice to change its character.

Indeed, the nationwide compilation of criminal history information by a federal agency of enormous power, such as the FBI, enhances the need for public access. As the government well recognizes, there exists in the compilation, computerization and centralization of criminal history data the potential for abuse. Br. 24-28. That potential for abuse, however, relates to the inaccuracy of the information collected and the ends for which it is subsequently used—concerns which are not *privacy* concerns and could not be *privacy* concerns inasmuch as this data is already public. As the brief of the American Civil Liberties Union suggests, the true objection is to possible misuses of the data, such as to facilitate discrimination. Discrimination is different from *privacy*, however; indeed, public access is often the most powerful antidote to discrimination. Here, then, as in all other facets of the criminal justice process, public monitoring

can perform an essential task. Access to the information ensures that the databank cannot be selectively employed by the government, or others, either to unfairly bestow largesse or to damage an individual.

D. THE AD HOC BALANCING APPROACH ADVOCATED BY THE GOVERNMENT THREATENS TO AFFORD THE FBI STANDARLESS DISCRETION

The government offers the ironic argument that this Court should reject the approach of the court below in part for administrative efficiency reasons. The government complains that the appeals court "imposed on the FBI the task of ascertaining whether the requested information is available as a 'public record' in some other, nonfederal government office, a fact . . . which is often not known." Br. 36. Specifically, the government is concerned that arrest records expunged at the local level may still appear in the government's compilation. The government apparently contends that the possibility of such an error would require the FBI to verify the accuracy of every compilation prior to disclosure, a burden the FBI would prefer to avoid.

Yet the government's argument only serves to underscore the *need* for disclosure. Neither the federal government, nor any local law enforcement agency, should be maintaining and using compiled criminal history information which reflects expunged arrest records, regardless of whether such information is publicly disseminated. *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974). Indeed, if public access forces the FBI and local law enforcement agencies to employ protective measures to ensure that

such compilations are accurately maintained and updated, the FOIA has been successful.

The irony of the government's position is that the approach advocated by the court below actually places little, if any, administrative burden on the FBI, in contrast to the "standard" proposed by the government here. Under the decision below, the public record status of the information requested obviates any activity by the FBI other than disclosure. In contrast, the government would have the FBI scrutinize each entry on every criminal record requested in order to assess the putative private and public interests affected by release. The agency would be required to consider the seriousness of the crime evidenced by the entry, the age of the entry, the disposition, and the sentence imposed. Every entry would need to be considered as well as the possible nexus between each entry and the specific public interest to be served by disclosure. The government gives no indication of how this "calculus of interests" would apply in specific cases, although it is obvious that the judgments to be made would be both myriad and complex.

Analysis of the government's position thus yields an entirely different impression than does first reading. Although seemingly sensitive to privacy interests, the "calculus" proposed by the government is so complicated and involves so many factors that it provides no meaningful disclosure standard at all. To the contrary, it threatens to imbue the FBI with virtually unlimited discretion to disseminate compiled criminal history records, either in whole or in selectively redacted part, to one individual and not to another as it might see fit. Such was never the intent of the FOIA; the government's position must be rejected.

II. ACCESS TO THE REQUESTED INFORMATION SERVES IMPORTANT PUBLIC INTERESTS

This case aptly illustrates the public interests served by press access to FBI "rap sheets." CBS News assigned correspondent Robert Schakne to investigate allegations of public corruption on the part of the Chairman of the House Appropriations Subcommittee, congressman Daniel Flood. In the course of his investigation Schakne discovered that Flood had played a key role in the awarding of defense contracts to Medico Industries, a business which the Pennsylvania Crime Commission indicated was dominated by "organized crime figures." To further this investigatory effort, Schakne submitted FOIA requests for the criminal history records of the Medicos. His purpose was to determine whether Congressman Flood had in effect aided members of organized crime in obtaining highly lucrative and sensitive public contracts.

These facts suggest some of the important public interests served by access to the requested information under the FOIA. One of the traditional roles of the press is to report on governmental affairs, see *supra*, at 7-9, and the infiltration of the defense department's contract procurement process by organized crime is a news story of unusual public concern. Access to the records here would have played a material role in reporting the story, as indeed rap sheet information is frequently crucial to reporting on organized crime. Where, as may be the case here, there is a connection between organized crime and government operations, access to criminal history information may be of even greater social significance.

A second, equally important concern is whether the government officials who awarded Medico the contracts

were aware of his criminal history. If they had access to it, and awarded the contracts anyway, serious questions concerning their conduct arise. If they did not know, about Medico's record, they should have, and the importance of press access to such data is demonstrated. The press serves an important function when it reports on matters that law enforcement has been unable to police because of limited resources, incompetency, or procedures which require reform or improvement.

Law enforcement and the press alike must strive to do their jobs in an age of increasing complexity and dwindling resources. The purpose of FOIA is to reduce information costs in order to facilitate the public's right to know. Likewise, the compilation of public criminal history information by the FBI serves to reduce the specific information costs associated with effective law enforcement. Seldom has the application of the "core purposes" of the FOIA to the requested information been clearer than it is here. Without access, the press will have to engage in expensive and time consuming research to report matters of public record which the FBI already has compiled. This Court need look no further than the facts of this case—facts the Solicitor General sadly seeks to obscure—to find the substantial public interests served by access to the requested records.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,
Petitioners,
v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE

SEARCH GROUP, INC.,
THE STATE OF NEW YORK,
DIVISION OF CRIMINAL JUSTICE SERVICES,
THE COMMONWEALTH OF KENTUCKY,
JUSTICE CABINET
AND UNITED STATES CONGRESSMAN
DON EDWARDS, (CHAIRMAN, SUBCOMMITTEE
ON CIVIL AND CONSTITUTIONAL RIGHTS,
HOUSE COMMITTEE ON THE JUDICIARY).

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I. STATEMENT OF THE CASE AND SUMMARY OF AMICUS ARGUMENT

This case poses a critical criminal justice information issue. Can a criminal history record^{1/} be withheld under the federal Freedom of Information Act, 5 U.S.C. § 552 (1982) ("FOIA"), on the grounds that public disclosure could reasonably be expected to constitute an unwarranted invasion of personal

^{1/} We use the term "criminal history record" throughout this memorandum to refer to cumulative, name indexed records consisting of descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges and any disposition arising therefrom, as well as information relating to sentencing and correctional supervision and release. As such, this term conforms to the definition in the federal regulations that govern the operation of state and local criminal history record systems, 28 C.F.R. § 20.3(b) (1987), and the definitions found in most state criminal history record legislation. The term "rap sheet" is a synonym for criminal history record.

privacy, even though some of the component parts of the record are available to the public from the police departments and courts that originally created these component parts.

A. Statement of the Case

This case arose as a result of a FOIA request to the Federal Bureau of Investigation ("FBI") by Robert Schakne, a CBS News correspondent, and the Reporters Committee for Freedom of the Press, an association of journalists. Their request sought all records indicating arrests, indictments, acquittals, convictions, and sentences -- in other words, criminal history records -- compiled by local, state or federal law enforcement agencies or courts relating to the Medico brothers, Phillip, Charles, William and Samuel. The

Reporters Committee for Freedom of the Press and Schakne eventually limited their request to criminal history records consisting of information that was a "matter of public record."

The FBI partially denied the request on the grounds that the records sought were exempt from disclosure under the FOIA exemptions at 5 U.S.C. § 552(b)(3) (1982) [covering records that are made specifically exempt from disclosure by other statutes];^{2/} 5 U.S.C. § 552(b)(6) (1982) ["Exemption 6"] [covering various kinds of personal records, the disclosure of which would constitute a clearly unwarranted invasion of privacy], and

^{2/} The FBI's claim with respect to the applicability of the exemption at 5 U.S.C. § 552(b)(3) (1982) has not been pursued in the Supreme Court.

5 U.S.C. § 552(b)(7)(C) (1982) ("Exemption 7(C)] [covering law enforcement records that could reasonably be expected to constitute an unwarranted invasion of privacy].

The district court upheld the FBI's partial denial, in part on the grounds that release could reasonably be expected to constitute an unwarranted invasion of personal privacy. The United States Court of Appeals for the District of Columbia Circuit, in two separate opinions, reversed.

The court of appeals' first opinion noted that when a federal agency seeks to withhold law enforcement records under Exemption 7(C), the agency must balance the record subject's privacy interest against the public interest in disclosure. Reporters Committee for

Freedom of the Press v. United States Department of Justice, 816 F.2d 730, 737 (D.C. Cir. 1987). In calculating the privacy interest, the court concluded that if "a state legislature requires arrests and convictions to be recorded made freely available by the primary source to the general public, any privacy interest in those records seems insignificant." Id. at 740. The court of appeals remanded the case to the district court to determine if applicable law or policy made the component parts of the records available to the public at their source.

The Department of Justice and the FBI sought a rehearing of the court of appeals' Exemption 6 and 7(C) determinations. SEARCH Group, Inc. and agencies of the states of New York and California filed an amicus petition

in support of the petition for rehearing. Upon review, a majority of the court of appeals panel reaffirmed its initial holding but changed, at least in part, the rationale for the holding. Judge Starr, on the other hand, voted to grant a rehearing and dissented from the majority decision.

On the privacy side of its analysis, the majority held in its second opinion that state law with respect to the disclosure of criminal history records, and presumably original records of entry, was irrelevant. Instead, the majority directed the district court to make a "factual determination" of whether information about arrests and convictions reflected in the criminal history record had previously appeared on the public record -- presumably at their primary source. As the

majority now saw it, if the information in question was available from primary sources, then the privacy interest would "fade" and whatever privacy interest remained would be "slight." This slight privacy interest could outweigh the public's interest in disclosure only if it could be shown that some specific and presumably significant harm would arise from disclosure. Reporters Committee for Freedom of the Press v. United States Department of Justice, 831 F.2d 1124, 1126-7 (D.C. Cir. 1987). (Hereafter, the first and second opinions are sometimes collectively referred to as "Reporters.")

Judge Starr dissented on a number of grounds. In particular, his dissent recognized that the privacy risk posed by the public disclosure of a computerized

compilation of criminal history data is very different from the risk posed by disclosure of original source records. Accordingly, Judge Starr concluded that whether records are available at their source is irrelevant to a determination of whether disclosure of criminal history records would be likely to result in an unwarranted invasion of privacy.

As I see it, computerized data banks of the sort involved here present issues considerably more difficult than and certainly very different from a case involving the source records themselves. Id. at 1128.

B. Summary of Amicus Argument

The Amicus parties assert that the majority below failed to take the proper considerations into account in identifying the

privacy interests at stake when criminal history records are sought under the FOIA.

First, the court of appeals should have evaluated whether, as a practical matter, criminal history records are, in fact, on the public record merely because some of their component parts are publicly available at their source. The court of appeals would have found that as a practical matter, members of the public cannot assemble a criminal history record from primary source records because to do so is too expensive, too time consuming and simply too difficult. Accordingly, the fact that many of the component parts of a criminal history record theoretically are available, separately and individually, from primary sources does not eviscerate a record subject's privacy interest.

Second, the court of appeals should have evaluated whether as a policy matter, criminal history records are on the public record. The court of appeals would have found that, as a matter of state law, state and local rap sheets are not placed on the public record. Statute law and regulations in all but a handful of states, make criminal history records, and particularly the nonconviction record^{3/} component of criminal history records, unavailable to the public, even while making many of the component parts of the

record available to the public from source documents.

Finally, the majority below, in weighing the privacy interest against the public's interest in disclosure, should have taken into account the same considerations that have led legislatures in almost every state to conclude that criminal history records should be confidential -- namely, that the public release of criminal history records, (more so than the release of original record of entry data) generally results in serious harm to privacy interests. These harms include: (1) the risk that release of a comprehensive, detailed and often times dated record of an individual's criminal conduct may cause greater damage to an individual's reputation and privacy than the release of merely a piece

^{3/} We use the term "nonconviction records" to refer to a record of an arrest without a disposition if more than one year has elapsed from the arrest and no active prosecution is pending as well as information indicating that a prosecutor has dropped charges and all other dismissals and, as well, all acquittals. As such, this term conforms to the definition in the federal regulations at 28 C.F.R. § 20.3(k) (1987).

of the total record; (2) the risk that the criminal history records maintained by the FBI, being merely compilations from many secondary sources, may contain inaccurate and incomplete information; and (3) the risk that release of criminal history records to any person for any purpose on the basis of a "name only" inquiry may result in the release of information about the wrong individual.

II. STATEMENT OF INTEREST

A. Identification of Amicus Parties

The Amicus parties are identified in some detail in Appendix B. The Amicus parties consist of a not-for-profit organization comprised of Governors' appointees from all

fifty states, who in most states are responsible for the operation of their states' criminal history record repository; agencies of the states of New York and Kentucky that are responsible for operating their states' criminal history record repositories; and a member of Congress who chairs a subcommittee with oversight responsibility for the FBI's handling of criminal history records.

B. The Amicus Parties Have a Critical Stake in the Outcome of the Reporters Case

The Reporters opinions, if allowed to stand, would require federal agencies to disclose state and local criminal history records in a manner contrary to the Amicus

parties' standards and laws.^{4/} In addition, the opinions, if allowed to stand, could have profound and adverse consequences upon the established system under which state criminal history record repositories share criminal history record information with the FBI.

State criminal justice agencies, usually the state's criminal history record repository, transmit felony and certain misdemeanor arrest and conviction information to the FBI as required by state law or policy.

^{4/} SEARCH has adopted model standards for state legislation governing the collection, maintenance, use and confidentiality of criminal history records. SEARCH's standards do not apply to chronologically arranged non-name indexed original records of entry. SEARCH's confidentiality standards call upon the states to protect criminal history records, and particularly non-conviction record information, from access by the press and the public. SEARCH, Technical Report No. 13, Standards for Security and Privacy of Criminal Justice Information (1978).

In a few states the FBI also obtains criminal history record information directly from local law enforcement agencies. Once obtained, this information is maintained by the FBI's Identification Division. At present, the Identification Division's database is the only national criminal history record database. However, the FBI and the states are currently testing a decentralized system for the interstate exchange of criminal history records. This system, called the Interstate Identification Index ("III"), consists of a computerized index at the FBI containing only personal identification data about individuals, including the individuals' fingerprint records, and an identification of the state or states (or the FBI, for federal offenders) maintaining a criminal history record about the individual. The III will

serve as a pointer to refer authorized requestors to the state or federal files where a complete criminal history record about the inquired upon individual is maintained.

It is likely that if the Reporters decision stands, many states would be compelled to reconsider the amount or nature of criminal history record information that they presently share with the FBI. In addition, many states may have to consider terminating their participation in the III. States and criminal history record repositories which failed to curtail their information sharing relationship with the FBI would be placed in the unenviable position of facilitating the circumvention of the confidentiality strictures in their own state law.

III. ARGUMENT

A. Criminal History Records Are Not on the Public Record

In its first opinion, the court of appeals reasoned that if criminal history record information was truly "on the public record" then the record subject's privacy interest, while not eliminated entirely, would be weakened considerably and the privacy interest/public interest balance affected accordingly. 816 F.2d at 739. However, the court of appeals explained that by using the term public record it meant that a more or less formal policy determination had been made that the information in question should be publicly available and that a mechanism be in place to accomplish this availability.

The phrase 'public record' implies, we believe, a good deal more than that the information be available. It means that a local, state or federal political body has made an affirmative determination that criminal records must be freely available to the general public and has provided a mechanism to ensure the implementation of that policy. Id. at 740.

The court of appeals abandoned this standard in its second opinion. Instead, the majority concluded that official law and policy with respect to disclosure is irrelevant and, rather, the only germane determination is whether as a "factual matter" the information is available. 831 F.2d at 1127.

We think that the court of appeals came closer the first time to identifying the considerations relevant to whether records submitted to federal agencies have previously been placed on the public record. As discussed below, other courts that have considered the effect of a prior release on an agency's entitlement under FOIA to withhold previously released data have found that the key question is whether there has been an official determination to release the data. Moreover, in assessing whether information is in fact available, it is surely relevant whether there is a mechanism in place that works effectively to make the information in question available. With respect to criminal history records, there is neither an effective mechanism to make the records publicly

available nor an official policy in support of public availability.

1. As a Practical Matter, Criminal History Records Are Not on the Public Record

The majority below seemed to assume that if original source records are publicly available by law then it follows that a requestor can obtain criminal history records merely by going to the original source for the information. In fact, nothing could be further from the truth.

Rap sheets maintained by state criminal history record repositories may consist of entries describing numerous arrests made over several years by law enforcement agencies in

many different jurisdictions and states. Rap sheets may also include information about charges filed by prosecutors in many different jurisdictions and states. Rap sheets may further contain dispositions relating to these various arrests and charges, and describing adjudicatory actions over several years, in different courts and in different jurisdictions and states. Finally, rap sheets may include correctional information that provides an historical account of correctional events stretching over several years and including entries from correctional agencies in different jurisdictions and states.^{5/}

^{5/} An example of the contents of an FBI rap sheet is found in SEARCH, Technical Report No. 14, The American Criminal History Record: Present Status and Future Requirements (1976), at 4.

Original source documents are different. For one thing, not all of the types of information included in a rap sheet are publicly available from their original sources. For example, correctional information customarily is not publicly available from the jail or correctional institution that is the source of the data. Similarly, charging information is generally not publicly available from the prosecutorial agency that is the source of the data.

Two types of primary source documents -- sometimes called original record of entry documents -- are customarily available to the public. First, virtually every police department keeps a daily record of arrests and other events involving police action. The title and character of these records varies

some from department to department, but usually these records include a blotter or log of calls to the department for assistance; incident or offense reports filed by police officers responding to these calls; and an arrest log or blotter identifying those individuals arrested or formally detained at the station house, along with a brief description of the reason for the arrest or detention.^{6/}

These daily records often are not available to the public by the names of record subjects and seldom, if ever, are available to the public on a cumulative basis -- i.e., the daily records do not contain or cross reference all of an individual's arrests or

6/ SEARCH, Privacy and Security of Criminal History Information: Privacy and the Media, Bureau of Justice Statistics (1979) at 17.

encounters with a particular police department. Rather, to obtain an individual's total record of encounters with a particular agency each day's record would have to be searched. By statute or case law in most states, and by tradition in every state, the chronological version of these daily blotters and logs are available to the public.^{7/}

Second, every court keeps a record, usually called a docket, of events occurring in that court. The docket includes records of arraignments, adjudications, sentences, and other judicial events. Customarily, these

records are indexed, or at least cross indexed, by the names of the parties. Occasionally, these records are cumulative, i.e., all of the events in a given court, even events involving different cases, in which a particular individual participated can be obtained by searching under that individual's name.^{8/} Moreover, increasingly, courts are automating their docket systems. However, even with respect to the most advanced court docket systems, access to the system merely provides a requestor with information about events that occurred in that court -- not in other courts. As a matter of constitutional

^{7/} Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. 1984), is representative of the decisions that have dealt with the availability of police blotter data. In Heard, a Texas state appellate court held that under Texas' Open Records Law, most parts of a police offense report must be made available to the public and the press. See also, for example, Cal. Gov't. Code § 6254(f).

^{8/} SEARCH Report, National Conference on Data Quality and Criminal History Records: Strategies for Improvement, Proceedings of a BJS/SEARCH Conference (Nov. 1986) at 23, 30 and 42; and Polansky "Computer Technology in the Courts," Legal and Legislative Information Processing, Greenwood Press (1980), at 201-5.

right, statute law or court rule, dockets are open to public inspection in every state.^{9/}

Indeed, even getting this one limited "piece of the puzzle" is something of an accomplishment. A requestor must know (or guess correctly) that the record subject in question has had contact with a particular police department or court. Moreover, if the police department or court does not compile its original source documents by name, or does not cross-index by name (as is often the case), then the requestor must not only know the name of the record subject and the agency that is likely to be maintaining a source document, but the requestor must also know the date on which the event occurred or the docket

^{9/} See, for example, Cal. Gov't Code, §§ 69842-69847 (Superior Courts) and §§ 71280.1-71280.3 (Municipal Courts).

or offense number under which the entry is filed.

Thus, when the court of appeals' majority directed the district court to make a "factual determination" whether information in a rap sheet is available from original source documents, they posed a specious question. 831 F.2d 1124, 1127. There is no "factual determination" that a district court need make with respect to whether the various pieces of information in a rap sheet are available to the public at their original sources. The answer to this question, in virtually every jurisdiction in the country, is that some, but by no means all of the types of information in a criminal history record, are indeed publicly available from original sources.

However, this answer fails to address the real issue -- does the availability of such information from various original sources make any difference from a privacy standpoint? Does such availability really mean that an individual's privacy interest, in any meaningful sense, has faded? The answer, most surely, is no. In the real world, criminal history records are not on the public record even though, theoretically, some of the component parts of the record are publicly available from original sources.^{10/}

^{10/} In Washington Post Co. v. United States Department of State, 647 F.2d 197, 199, 200 (D.C. Cir. 1981) (Lumbard, J. concurring), rev'd on other grounds, 456 U.S. 595 (1982), the concurring opinion argued that in determining whether a "public record" is available under FOIA, courts should take into account the fact that the information in question is difficult to obtain.

2. As a Policy Matter, Criminal History Records Are Not on the Public Record

Not only are state and local criminal history records unavailable as a practical matter, these records are also unavailable as a matter of state law. The court of appeals' first opinion reasoned that a determination of whether records have been placed on the public record turns primarily on whether the relevant law affirmatively places the records on the public record. Other courts have reached the same conclusion.^{11/}

^{11/} In Safeway Stores Incorporated v. Federal Trade Commission, 428 F. Supp. 346, 347 (D.D.C. 1977), Judge Gesell held that the Federal Trade Commission could withhold an agency report under an applicable FOIA exemption even though the report had possibly been leaked to the Washington Post.

Publication by the
Washington Post was
(footnote continued)

In the instant case, state and local agencies have not placed criminal history records on the public record because the law and regulations that control their handling of

(footnote continued from previous page)
unauthorized by the Commission and any staff disclosure, if it occurred, was prohibited under 15 U.S.C. § 50. A close reading of the Washington Post article, moreover, raises considerable doubt that the Post ever had full access to the report. In any event, an unauthorized "leak" does not constitute a waiver of the (b)(5) exemption. *Id.* at 347.

See also, Murphy v. Dept. of the Army, 613 F.2d 1151, 1155, 1156 (D.C. Cir. 1979), (holding that an exemption can be asserted under FOIA even though the record had been disclosed to Congress because the applicable law authorizes such disclosure). Laborers' Internat'l Union of North America v. United States Dep't. of Justice, 578 F. Supp. 52, 58 (D.D.C. 1983) (holding that an unauthorized leak of an agency report does not prevent the agency from withholding the report under Exemption 7(C)); Murphy v. Federal Bureau of
(footnote continued)

criminal history records make such records unavailable to the public. Indeed, from the very outset, policy makers, legislatures and the courts have recognized what seems to have escaped the court of appeals' majority -- that criminal history records and original records of entry are very different types of records that serve very different purposes.

Unquestionably, the public has a legitimate interest in individuals who are arrested or indicted, and a right of access to information concerning crime in the community.

Branzburg v. Hayes, 408 U.S. 665, 695 (1972);
Houston Chronicle Publishing Company v. City of Houston, 531 S.W.2d 177, 186, 187 (Tex.

(footnote continued from previous page)
Investigation, 490 F. Supp. 1138, 1143 (D.D.C. 1980), (holding that leaks of an ABSCAM report do not affect the FBI's entitlement to withhold records under Exemption 7).

Civ. App. 1975) application for writ of error refused, 536 S.W.2d 559 (Tex. 1976); Tennessean Newspaper, Inc. v. Levi, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975). In recognition of this interest, police blotter records and, particularly court docket records, historically have been public in the United States. Their public status is intended to guard against secret arrests and "star chamber" proceedings, and to ensure that the public is informed as to the nature of criminal proceedings, usually through the press.^{12/}

By contrast, criminal history record systems were created by police agencies to serve law enforcement and other criminal

^{12/} SEARCH, Technical Report No. 13, supra, note 4.

justice purposes. Until the mid to late 19th century, criminal history record "systems" in the United States consisted of little more than random and informal notes kept by police officers in a few urban centers.^{13/} By the early 20th century law enforcement agencies had begun to compile criminal history records in a more formal way and maintain these records in connection with fingerprint and other identification data.^{14/}

These early criminal history records were viewed as the property indeed, in a sense, as

^{13/} Office of Technology Assessment, An Assessment of Alternatives for a National Computerized Criminal History System, (1981) at 21 (hereafter "OTA Study").

^{14/} SEARCH, Criminal Justice Information Policy: Intelligence and Investigative Records, Bureau of Justice Statistics (1985) at 16-17; Laudon, Dossier Society, Columbia Univ. Press (1986) at 32-36, (hereafter "Laudon").

the "personal notes", of police officers and their agencies. Accordingly, decisions to create such records; maintain such records; use such records; or disclose such records, were regarded, more or less exclusively as matters of police discretion. Well into the mid-1960s, criminal history records in most states were exempt from open record or official record laws. A 1971 survey found that, in general, arrest records were disclosed or, more often, withheld solely at police discretion.

Courts usually refuse to interfere with the police practice of limiting public access to arrest records but circulating the records at their discretion.^{15/}

^{15/} "Retention and dissemination of arrest records: Judicial Response," 38 U. Chi. L. Rev. 850, 863 (1971).

Early court challenges to police departments' selective release of criminal history records were rebuffed on the grounds that the records were not confidential at common law or by statute.^{16/}

By the late 1960s and early 1970s the exercise of police discretion selectively to disclose criminal history record information outside of the criminal justice system was under attack. The basis for the attack included concerns about the computerization of criminal history record information; the potential for misuse of the records by non-criminal justice recipients; the poor quality

^{16/} Hansson v. Harris, 252 S.W.2d 600, 603 (Tex. Civ. App. 1952); and Kolb v. O'Connor, 818, 824 (Ill. App. Ct. 1957).

of the records; and the unfairness to record subjects arising from selective release of criminal history and especially nonconviction data. These concerns created a climate in which selective, discretionary release of criminal history records was politically unacceptable.^{17/} Indeed, as early as July 1970, Project SEARCH, the predecessor to SEARCH, published a report calling attention to the emergence of formal and automated criminal history record systems and the threat that such systems pose to personal privacy.^{18/}

^{17/} Marchand, The Politics of Privacy, Computers and Criminal Justice Records, Information Resource Press (1980) at 148-150; Report of the Secretary's Advisory Committee on Automated Personal Data Systems, U.S. Dept. of Health, Education and Welfare, Records, Computers and the Rights of Citizens (1973), at 222-243.

^{18/} SEARCH, Technical Report No. 2, Security and Privacy Considerations in Criminal History Information Systems, (1970).

In 1973, Congress took an initial step toward assuring that criminal history records maintained in state and local information systems would be unavailable to the public. The Crime Control Act of 1973 required that criminal history records in state and local information systems that received federal monies [and by then virtually all state and most large, local systems had received federal monies through the Law Enforcement Assistance Administration ("LEAA") "only be used for law enforcement and criminal justice and other lawful purposes."^{19/}

^{19/} Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789(b)(1982), as amended by § 524(b) of the Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197 (1973).

In 1976, the LEAA issued implementing regulations.^{20/} Importantly, the federal regulations do not apply to original records of entry, such as police blotters, if maintained on a chronological basis, nor to court records of public judicial proceedings or published court opinions.^{21/} Instead, they apply only to name indexed, cumulative criminal history records. The regulations require state and local agencies to withhold from the public arrest records without dispositions, if more than a year has elapsed since the date of arrest and the record does not indicate that the case is actively pending, and all types of dispositions favorable to the record subject, such as

dismissals and acquittals, unless state law provides otherwise.^{22/}

Today, every state but three, makes a sharp distinction in disclosure policy between criminal history records and original records of entry. Only Florida, Wisconsin and Oklahoma make criminal history records freely available to the public and, even then, criminal history records obtained by criminal history record repositories in these states from out-of-state sources are unavailable to the general public.^{23/}

Criminal history record statutes in the other 47 states base their dissemination

22/ 28 C.F.R. § 20.21(b)(1)(2) (1987).

23/ Fla. Stat. Ann. 943.053; Wis. Stat. Ann. § 19.35; and Okla. Stat. Ann., Tit. 51, § 24A.8.

20/ 28 C.F.R. Part 20 (1987).

21/ 28 C.F.R. § 20.20(b)(3), (4) (1987).

policy on whether the criminal history data is conviction or nonconviction data. Conviction data, although generally unavailable to the public, is often available to governmental non-criminal justice agencies and even private employers. In general, conviction data is far more available outside the criminal justice system than is nonconviction data.^{24/} By contrast, in all 47 states nonconviction data cannot be disclosed at all for non-criminal justice purposes, or may be disclosed only in narrowly defined circumstances, for specified purposes.^{25/}

24/ See, for example, Ga. Code, §§ 35-3-34, 35-3-35; Hawaii Rev. Stat. Ann. § 846-9; Me. Rev. Stat. Ann. § 16-615; Mo. Rev. Stat. § 610.120; Neb. Rev. Stat. §§ 29-3520, 3523; Ore. Rev. Stat. § 181.560.

25/ See, for example, Conn. Gen. Stat. Ann. § 54-142n; Ga. Code Ann. §§ 35-3-34, 35-3-35; Hawaii Rev. Stat. Ann. § 846-9; Me. Rev. Stat. Ann. § 16-615; Neb. Rev. Stat. § 29-3523.

These specified non-criminal justice purposes may include licensing or public or private employment screening, but in many cases only if the requestor can cite separate legal authority to obtain and use the records, such as a licensing statute.^{26/} Often this supporting legal authority must be "express" or "specific"^{27/} or must refer to criminal conduct or to criminal records and must set out requirements, exclusions or limitations based upon such conduct or records.^{28/} As a further limitation, statutes in some states

26/ Del. Code Ann. Tit. 11 § 8513(b)(1); Hawaii Rev. Stat. Ann. § 846-9(5); Ill. Stat. Ann. Ch. 38 § 206-7; Ind. Stat. Ann. § 5-2-5-5.

27/ Ariz. Rev. Stat. Ann. § 41-1750.G; Ark. Code Ann. Tit. 12-12-211; Me. Rev. Stat. Ann. Tit. 16 § 613.

28/ Conn. Gen. Stat. Ann. § 54-142n; Ill. Stat. Ann. Ch. 38 § 206-7; Pa. Cons. Stat. Ann. §§ 18-9124, 9125; Va. Code Ann. § 19.2-389.A (ii), (vii).

provide that criminal history records may be released for licensing or employment purposes only for occupations involving the public safety or the custody of children or valuable property or information.^{29/}

In still other states, the statute delegates the authority to release criminal history records for noncriminal justice purposes to a designated official or board.^{30/} Surveys undertaken by SEARCH reveal that policies adopted by these officials or boards, pursuant to statutory authority, typically permit the release only of conviction records for noncriminal justice purposes and require applicants to show a need for the information

^{29/} Ga. Code 1981 § 35-3-34, 35; Wash. Rev. Code Ann. § 43.43.815.

^{30/} S.D. Cod. Laws Ann. § 23-6-14.

based upon separate legislative authority, executive order or court order.^{31/}

The courts, like the legislatures, have also distinguished sharply between criminal history records and original records of entry. In Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 186-7 (Tex. Ct. App. 1975), for example, a Texas state court ruled that the public has a First Amendment right of access to certain chronologically arranged factual data, such as that contained in a police blotter and the first page of an offense report, insofar as it supplies basic

^{31/} SEARCH, A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of the Interstate Identification System for Noncriminal Justice Purposes, Federal Bureau of Investigation, National Crime Information Center (1984) (hereafter "FBI Study").

information about an arrest.^{32/} However, the court denied public access to a record subject's rap sheet, noting that the access rights must be balanced against other competing interests, including the interest in privacy.

The constitutionally protected access of the press and public to the limited Offense Report, as described herein, should be made immediately available at a convenient 'central location' to meet the need

^{32/} In Holcombe v. State, 200 So. 739, 746 (Ala. 1941), the Alabama Supreme Court held that jail dockets and records which contain information describing each prisoner received into a local jail, their age, sex, identifying characteristics, and the charge or offense are public records and could be inspected by a newspaper reporter. In Dayton Newspaper Inc. v. City of Dayton, 341 N.E.2d 576, 578 (Ohio 1976), the Ohio Supreme Court held that a city jail log, which listed arrest numbers, names of prisoners, charges, dates, times, and dispositions was a public record and must be disclosed to a newspaper.

of the public's right to know.

The Personal History and Arrest Record is an entirely different matter. This record, or 'rap sheet', consists of the criminal history of the individual, insofar as it shows each previous arrest and other data relating to the individual and the crimes he has been suspected of committing.

* * *

A holding that the Personal History and Arrest Record must be open to inspection by the press and public would contain the potential for massive and unjustified damage to the individual. Id. at 187-88.

Similarly, in New Bedford Standard-Times Publishing Co. v. Clerk of the Third District Court of Bristol, 387 N.E.2d 110, 116 (Mass. 1979), the Supreme Judicial Court of

Massachusetts upheld a statutory scheme which made the courts' chronological record of criminal proceedings publicly available but which made the courts' alphabetical name index of such proceedings confidential.

It is clear enough that most court records do not aggregate information concerning the criminal history of an individual, and therefore do not threaten the privacy interests the Act seeks to protect. The alphabetical index, on the other hand, listing offenses charged and dispositions for each individual, provides aggregated information similar to that regulated by the Act. It is therefore appropriately subjected to limitation to reinforce the regulation of CORI. It has not been shown that the limitation in question exceeds permissible limits or invades any constitutional

right of the plaintiff.
Id. at 176.

B. Public Availability of Criminal History Records Threatens Significant Privacy Interests

As discussed above, we believe that the majority in Reporters erred because it failed to recognize that criminal history records are not on the public record, both as a matter of administrative practice and as a matter of applicable law. In addition, we believe that the majority erred because it failed to appreciate that even if all of the component parts of a criminal history record were effectively available to the public -- which they most certainly are not -- the damage to a record subject's privacy interest from release of a criminal history record is different from

and more serious than the damage to a record subject's privacy interest from release of any one or more of the original records of entry. The availability of original records of entry is not, as the majority implies, "tantamount" to making criminal history records available. 831 F.2d at 1127.

The majority resisted engaging in an analysis of the privacy threat posed by release of criminal history records on the grounds that the Congress, unlike state legislatures, has not adopted legislation expressly making criminal history records confidential. *Id.* at 1127. However, the courts' obligation under Exemption 7(C) to weigh the privacy interest in confidentiality against the public interest in disclosure is precisely the process that has led state

legislatures to conclude that criminal history records, unlike original records of entry, must be confidential.

In this regard three considerations are especially relevant: (1) disclosure of a criminal history record is more intrusive than disclosure of one or more source documents because a criminal history record provides a comprehensive and detailed history of an individual's criminal career that may often include references to old and no longer timely events; (2) release of criminal history records held by the FBI is more likely to harm record subjects than release of source documents because the FBI's criminal history records are a compilation of many different pieces of data from many different sources, and are therefore more likely than original

source documents to be inaccurate or incomplete; and (3) a request for a criminal history record based merely on the name of the record subject is more likely to result in the disclosure of information about the wrong person than is a request for an original record of entry.

The courts have long recognized that one of the interests protected by privacy is an individual's interest in avoiding the public disclosure of a comprehensive and detailed profile of the individual's activities.^{33/} A

^{33/} For example, in Doe v. Webster, 606 F.2d 1226, 1238, 1239 n. 49 (D.C. Cir. 1979) the D.C. Circuit cited several federal court opinions in which the systematic recordation and dissemination of information about individuals was found to implicate privacy interests. The court concluded "Partly for these reasons, the need to restrict the dissemination of criminal records is becoming more and more recognized."

criminal history record provides precisely this kind of comprehensive and detailed picture of an individual's activities in the criminal sphere. If an individual's criminal history record is placed in the public domain, an individual's entire life with respect to contact with the criminal justice system is available for inspection by business associates, neighbors, or any member of the public on the basis of nothing more than mere curiosity. By contrast, original source documents disclose merely one isolated event relating to an individual's contacts with the criminal justice system. Accordingly, release of criminal history data, as opposed to release of an original record of entry, presents a far more serious threat to an

individual's interest in protecting his privacy.^{34/}

Disclosure of a criminal history record also entails an increased risk of disclosing records which relate to "old" arrests or other "old" criminal justice events. By contrast, there is less risk of obtaining an aged entry

^{34/} In United States Department of State v. The Washington Post Company, 456 U.S. 595, 602 n.5 (1982), this Court held that the State Department's disclosure under FOIA of records indicating that certain Iranian nationals held United States passports might implicate the privacy interests protected by Exemption 6. This Court reached this conclusion notwithstanding the fact that citizenship information is a matter of public record. One lesson from the Court's analysis in Washington Post is that even non-intimate, public record information may present a threat to privacy when combined with other pieces of information.

See also, Fiumara v. Higgins, 572 F. Supp. 1093, 1109 (D. N.H. 1983), in which a federal district court upheld the use of Exemption 7(C) to withhold criminal history records.

from an original record of entry because the requestor must know the date or at least the period of time in which the underlying event occurred, and the entry must still be retrievable.

Public disclosure of old criminal history data implicates privacy interests because such data is unlikely to be reflective of the individual's current character or conduct. Empirical research, for example, indicates that records of old arrests or convictions are not likely to be reflective of an individual's character or conduct.^{35/}

^{35/} A Bureau of Justice Statistics report found that most recidivism, "occur[s] within the first three years after release: an estimated 60 percent of those who will return to prison within 20 years do so by the end of the third year." Bureau of Justice Statistics, Special Report: Examining Recidivism (February, 1985) at 1-2. A 1988 (footnote continued)

In evaluating the extent to which individuals have a privacy interest in criminal history records, the courts have been sensitive to the special privacy threat posed by old records.

In Wolston v. Readers Digest, 443 U.S. 157, 168 (1979), for example, this Court held that after 20 years an individual is no longer a public figure by virtue of a conviction record.

(footnote continued from previous page)
study by the Massachusetts Department of Corrections similarly found that recent conviction information has a strong predictive value with respect to future criminality but that older criminal history record information has virtually no predictive value. Massachusetts Department of Corrections, Statistical Tables Describing the Background Characteristics and Recidivism Rates for Releases From Massachusetts Correctional Institutions During 1985, (1988) at 7-9.

This reasoning leaves us to reject the further contention that . . . any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on the limited range of issues relating to his conviction.

* * *

To hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime. Id. at 168-9.

In Natwig v. Webster, 562 F. Supp. 225, 231 (D.R.I. 1983), a federal district court ordered the purging of a 15 year old arrest record, in part on the grounds that the record subject had been free of involvement with the criminal justice system since his arrest, and the record therefore was no longer reflective of his character.

Similarly, in Briscoe v. Readers Digest Association, 93 Cal. Rptr. 866, 873-4 (1971) the California Supreme Court upheld an invasion of privacy claim against Readers Digest for publishing an article that revealed that the plaintiff had been convicted for the hijacking of a truck. The court reasoned:

[i]t would be a crass legal fiction to assert that a man once public never becomes private again

Plaintiff is a man whose last offense took place 11 years before, who has paid his debt to society, who has friends and an 11 year old daughter who are unaware of his early life -- a man who assumed a position in "respectable society." Id. at 873-74.

The second factor that makes the public availability of criminal history records under FOIA, as opposed to the public availability of original records of entry, a far more serious privacy threat relates to the nature of criminal history records maintained by the FBI.

Low disposition reporting rates at the FBI are widely conceded to be a problem. Studies of the rate of disposition reporting to the Identification Division indicate a very substantial shortfall. For example, a 1980 study by the Jet Propulsion Laboratory, undertaken for the FBI, found that the Identification Division received dispositions for only about 45 percent of reported

arrests.^{36/} A report by the Office of Technology Assessment ("OTA") also found problems. According to OTA, approximately 30 percent of the Identification Division's arrest entries as of 1980 lacked available court dispositions.^{37/} Some of the research conducted for OTA's 1980 survey, but not published as part of the OTA report, found even lower disposition reporting rates in the range of 60 percent of arrest entries without available court dispositions.^{38/} Further, a SEARCH/Bureau of Justice Statistics conference involving repository directors, court administrators, congressional officials, and

FBI officials, held in September of 1984, heard reports that the Identification Division's disposition reporting problem is more severe than many surveys indicate and that perhaps over 50 percent of available dispositions do not get reported to the FBI.^{39/} Further, the OTA Study compared the information in the FBI's criminal history records with information from the original source documents on which the criminal history record entries were based and found that approximately 20 percent of the FBI entries contained material inaccuracies.^{40/}

^{36/} Jet Propulsion Laboratory, FBI Fingerprint Identification Automation Study: AIDS III Evaluation Report, Volume 5; Environmental Analysis unpublished monograph (Nov. 15, 1980), at A-3.

^{37/} OTA Study, supra, note 13 at 92.

^{38/} Laudon, supra, note 14 at 137.

^{39/} SEARCH, Criminal Justice Information Policy: Data Quality of Criminal History Records (1985) at 23-24.

^{40/} OTA Study, supra, note 13 at 91.

By contrast, original records of entry are created by the very agency that is responsible for the event described in the entry. Accordingly, most experts believe that original records of entry are more likely than criminal history records to contain an accurate description of an event. Moreover, an original record of entry does not purport to be complete and, accordingly, does not require the reporting of available dispositions. For these reasons, release of FBI-held criminal history records to the public entails a greater risk of disclosing inaccurate or incomplete information than does the release of original records of entry. Courts have found that the government's release of inaccurate or incomplete personal

information involves a serious threat to an individual's privacy interests.^{41/}

^{41/} For example, in Tarlton v. Saxbe, 507 F.2d 1116, 1124 (D.C. Cir. 1974), the D.C. Circuit stated:

government collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a leveling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment

And see, Pruett v. Levi, 622 F.2d 256, 257 (6th Cir. 1980); Doe v. Webster, 606 F.2d 1226, 1238, n.49 (D.C. Cir. 1979); Utz v. Cullinane, 520 F.2d 467, 487, n.29 (D.C. Cir. 1975); Testa v. Winquist, 451 F.Supp. 288, 394 (D.R.I. 1978); Shadd v. United States, 389 F.Supp. 721, 724 (W.D. Pa. 1975), aff'd, 535 F.2d 1247 (3d Cir. 1976), cert. denied, 429 U.S. 887 (1976).

A third privacy threat posed by the public release of criminal history records is the increased risk that the records that are released will not relate to the subject of the request. The release of a wrong record may do serious and inappropriate harm to both the subject of the request and the subject of the record. Under the majority's opinion, it seems likely that federal agencies would be required to provide criminal history records to the public solely on the basis of a record subject's name, and without benefit of a record subject's fingerprints, or even biographical data or other descriptions.

Studies show that when agencies attempt to obtain criminal history records on the basis of "name only" information agencies sometimes retrieve records that do not relate

to the individual who is, in fact, the subject of the request.^{42/} The explanation, of course, for these cases of misidentification is that many surnames are identical or similar and that many individuals who are the subject of criminal history record checks use aliases. Partly for this reason, some state criminal history record statutes and the SEARCH standards prohibit the release of rap sheet data to otherwise authorized non-criminal justice agencies except on the basis of fingerprint comparison.

By contrast, when a member of the public seeks access to a source document, the chance of obtaining information about the wrong individual is minimal. A requestor cannot obtain information from a source document

^{42/} SEARCH, FBI Study, supra, at 57, note 31.

unless the requestor already knows a good deal about the record subject. For example, a requestor must know the agency or court with which the record subject had contact; the requestor must know at least the approximate dates on which the contact occurred; and often times, the requestor must know the docket number or other identification number under which the event is recorded.

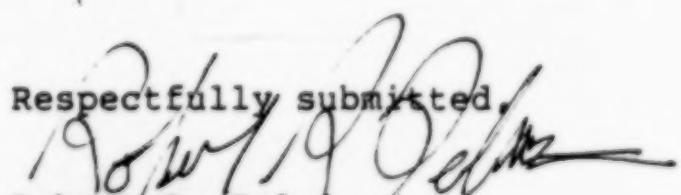
Not surprisingly, the courts have had no trouble finding that privacy type interests are implicated when the government takes action on the basis of information about the wrong person.^{43/}

^{43/} For example, in McCollan v. Tate, 575 F.2d 509, 511 (5th Cir. 1978), the Fifth Circuit held that an individual arrested on the basis of a misidentification by a sheriff's office may have a basis for a Section 1983, false imprisonment action.

CONCLUSION

For all of the reasons set forth above, the Amicus Parties urge the Court to reverse the court of appeals and to find that a federal agency's assertion of Exemption 7(C) to withhold criminal history records is not compromised because some of the component parts of the record are publicly available at their source; and further to find that the public availability of criminal history records threatens significant privacy interests.

Respectfully submitted,



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APPENDIX

- B. Letter of Consent to the Billing of the Chief Medical Officer**
- C. Authorization of Medical Curies**
- D. Certificate of Service by Complaint or Record**

APPENDIX A

**Letters of Consent to the Filing of
the Brief Amici Curiae**



U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530
June 15, 1988

Robert R. Belair, Esq.
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Re: Department of Justice v. Reporters' Committee
for Freedom of the Press, No. 87-1379

Dear Mr. Belair:

I hereby consent to the filing of a brief amicus curiae in the above case on behalf of Search Group, Inc. and agencies of the States of New York and Massachusetts.

Sincerely,

Charles Fried
Charles Fried
Solicitor General

cc: Joseph F. Spaniol, Jr., Esquire
Clerk
Supreme Court of the United States
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NOT ADMITTED IN DC

June 8, 1988

Robert R. Belair, Esq.
1800 M Street, N.W.
Washington, D.C. 20036

Re: United States Department of Justice v. Reporters
Committee for Freedom of the Press, No. 87-1379

Dear Mr. Belair:

This letter will serve to confirm that Respondents in the above-captioned case consent to the filing of an amicus curiae brief on behalf of Search Group, Inc. I would appreciate it if you would serve us by hand when you file your brief.

Very truly yours,
Paul Mogin
Paul Mogin

PM/kdd

APPENDIX B

Identification of Amici Curiae

IDENTIFICATION OF THE AMICI CURIAE

SEARCH Group, Inc. ("SEARCH") was established in 1974 and is a not-for-profit corporation organized under the laws of the State of California. SEARCH is governed by a Membership Group comprised of governors' appointees from each state. In most cases, the appointees are responsible for the operation of the agencies in their states which collect, maintain and disseminate, as authorized, criminal history records and related identification information. Generally these agencies are referred to as "criminal history record repositories".

The Division of Criminal Justice Services of the State of New York is responsible for operating New York's criminal history record repository. As part of this responsibility, the Division is charged, among other things, with ensuring that only "qualified agencies" have access to information held by New York's criminal history record repository. N.Y. Executive Law § 837(6) (McKinney, 1982). Moreover, Section 837(8) of the New York Executive Law imposes on the Division a duty to "adopt appropriate measures to assure the security and privacy of [criminal history record information]." Under New York law, it could be unlawful for a state official to disclose criminal history records to any agency or person, for any purpose not authorized by law.

The Kentucky Justice Cabinet, through the Department of State Police, is responsible for

the direct control and supervision of the centralized Criminal History Record Information System in the Commonwealth of Kentucky. Kentucky law bars the state police from allowing public inspection of centralized criminal history records. K.R.S. 17.150 0(4).

Don Edwards (D. Calif.) is a Member of Congress and Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. As the chairman of the subcommittee with oversight and legislative responsibilities for the Federal Bureau of Investigation on matters involving criminal history records, he is vitally interested in protecting the privacy interests of the subjects of criminal history records held by the FBI.

APPENDIX C

Certificate of Service by Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have caused three copies of the foregoing Brief of Amici Curiae SEARCH Group, Inc., the State of New York, Division of Criminal Justice Services, the Commonwealth of Kentucky, Justice Cabinet, and United States Congressman Don Edwards to be served by first class mail postage prepaid upon:

Counsel of Record for
Petitioner United States
Department of Justice
Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Counsel of Record for
Respondent Reporter Committee
for Freedom of the Press
Kevin T. Baines
Williams & Connolly
839 17th Street, N.W.
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on or before August 4, 1988


Robert R. Belair
Counsel of Record for Amici Curiae SEARCH Group, Inc.
et. al.

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as?